Law, Society and the Economy

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Law, Society and the Economy

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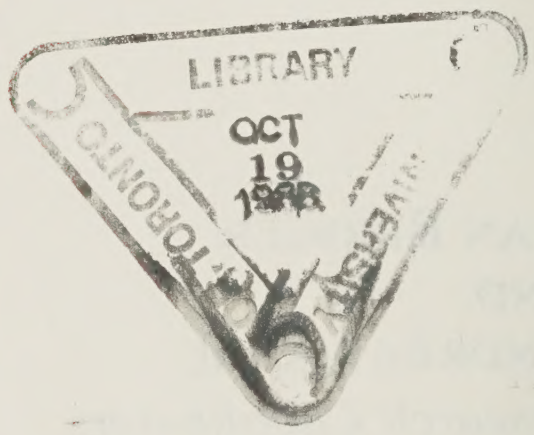

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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

PREFACE

This volume is the first of a series of six volumes (46-51) that fall within the section entitled Law, Society and the Economy. This section in turn serves as both an introduction and background to all the research on law and constitutional issues prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. It analyzes how law has evolved under the pressure of social and economic changes and how it in turn has brought about changes in Canada's social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government policy. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. For to ask what is the role of the state is to also question the role of the law.

This particular volume is composed of four studies that take a global look at law considered as a social phenomenon. While Harry Arthurs' essay was originally planned as an introduction to the rest of the section, the other three papers were intended to bring together the views of the various authors of the research studies. In the end, what we have are four pieces that each provide a distinct perspective on law and, taken

together, offer views that range from purely theoretical considerations to policy-oriented suggestions.

What comes out of these studies is a strong feeling that something fairly urgent has to be done in order to make law a more efficient and responsive instrument of social and economic change. There are clear indications of discontent at the way law is used, the most obvious, but not the only one, taking the form of a strong call for deregulation. The danger, however, is that by yielding to such simple solutions, Canadians may miss the point completely and wake up to much more serious problems. What is needed, suggest the research studies, is a better understanding of the variety of tools that law offers, a clearer perception of the need to closely relate means, goals and social values, and a pragmatic method for doing so. If this book succeeds only in stimulating a wide debate about law and the way it is used, it will have reached its objective.

IVAN BERNIER AND ANDRÉE LAJOIE

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I.B. & A.L.

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Law, Society and the Economy: *An Overview*

IVAN BERNIER
ANDRÉE LAJOIE

Introduction

In 1959, Wolfgang Friedmann, in the Preface to his *Law in a Changing Society*, stated his conviction "that the law must, especially in contemporary conditions of articulate law-making by legislators, courts, and others, respond to social change if it is to fulfil its function of a paramount instrument of social order."[1] In 1983, this theme of adaptation, far from having lost its topicality, seemed of such importance to this Royal Commission's research directors that they adopted it as the main theme of their research program.

Firstly, it should come as no surprise that the various studies making up this first phase of the Commission's legal research (Volumes 46–51) give primary attention to the fundamental question of the role of law as an instrument of economic and social development and generally use a dual approach. They are retrospective in that they attempt to describe generally how law, in its broad sense, has evolved over the past 35 years; but they are also prospective in that, based on speculative thought, they attempt to assess law as an instrument for achieving socio-economic objectives. Secondly, the sectorial studies of this first phase of research shed some light on the legislative process, its relation to the judicial process, its administrative outcome, and its impact on reality. Finally, throughout this portion of the research one can detect in the background the ongoing debate between, on the one hand, welfare objectives, in the sense of the quality of life, and, on the other, purely economic objectives, usually expressed in quantitative terms of cost, growth and efficiency, with law expressing the compromises reached. In this sense, this portion of the research also touches on the problem of the relationship between law and values.

While at the outset they may appear to be somewhat theoretical, the basic issues raised in this phase of the research are in fact closely related to the Commission's mandate. At first glance, the mandate appears to be concerned with law only insofar as it relates, in general terms, to the Constitution, the distribution of powers and institutions. On closer analysis, however, it is seen that, in practice, all legal activity of the state is questioned, for the Commission is asked to report on the "appropriate arrangements . . . to promote the liberty and well-being of individual Canadians and the maintenance of a strong and competitive economy." As Harry Arthurs points out in his introductory remarks:

> A royal commission concerned about the performance of national institutions, about the extent and effects of public decision making in the economic sector, about the attainment of social justice and equity, must naturally undertake "legal" research — on the Constitution, on regulatory regimes, on welfare and tax laws. But such research has, in the past, all too often failed to articulate underlying assumptions or theories about what law is, how it works, and why it sometimes does not. By the same token, proposals to stimulate or constrain marketplace activity, to ameliorate its social effects, or to mobilize private or public power through the use of law have often failed to address specific questions about what kind of law, operating through which legal forms, can best (if at all) accomplish specific purposes.[2]

The soundness of this viewpoint was confirmed beyond all doubt at the Commission's hearings. A good many briefs, particularly those from the business community, criticized excessive regulation by governments. For example, the Conseil du patronat du Québec, the largest employer group in Quebec, claimed:

> A number of studies show what businessmen already knew from experience: excessive regulation slows down innovation and discourages investment. That there currently exists in Canada, as elsewhere, a strong movement for deregulation advocating a reduction of state intervention in all its forms surprises no one. [Translation][3]

For Bell Canada Enterprises, however, the need for regulation in certain circumstances was undeniable. But its response to the question raised by the Commission, "What is the solution: to increase or decrease the number of regulations, or even to improve their content?" was the following:

> We can state unequivocally that Canada must decrease the number of regulations and improve the content. Firstly, the number and scope of the demands imposed on businesses through regulation should be reduced; secondly, regulation should be more flexible, more conscious of the impact of new technology and growing competition, and more expedient in its decisions. [Translation][4]

From a completely different perspective, the only brief that focussed specifically on law, that of the British Columbia Law Union, adopted a

distinctly more radical position in pointing out that law and Canadian procedure were becoming increasingly authoritarian, costly and inefficient.[5] While categorical in its statements, the brief exhibited some ambivalence with regard to the role of law in solving the problems concerned. Tackling issues as diverse as immigration, legal aid, civil and criminal justice, native peoples, the courts, the Charter of Rights and Freedoms, and women, it argued in favour of increased state intervention in some sectors while denouncing the growing "legalization" of Canadian society.

A number of other briefs, without questioning the role of law as such, recommended more legal intervention in areas such as social and environmental law. It is interesting and, moreover, highly indicative of the political climate of the early 1980s that a good many intervenors did not hesitate to entrust the Constitution with resolving various kinds of problems, as though the only way of effectively dealing with them was to turn them over to the Constitution and the judges rather than to the legislative power. Among the various suggestions for constitutional amendment proposed at the hearings, we might mention, among others, the entrenchment of property rights, the guarantee of the freedom of movement of individuals, services and capital, the constitutional recognition of municipal governments, a declaration of the rights of workers, including the right to employment, the right to a decent wage and the right to strike, and a statement of principle ruling that every individual has the right to drink clean water, breathe clean air, and so on. The growing number of such demands reflects, in a sense, a loss of confidence in ordinary law and in the legislative process.

This challenging of law as an instrument of economic and social development is not specific to Canada. It in fact reflects a broader debate that has been going on in the United States and Europe for a number of years. In 1979, for example, Lawrence H. Tribe of Harvard University, in an article entitled "Too Much Law, Too Little Justice: An Argument for Delegalizing America,"[6] pointed out that the United States had three times more lawyers per capita than England and twenty times more than Japan, and that in 1977 alone the various legislative bodies of the United States, including municipalities, adopted no fewer than 150,000 laws, many of which generated regulations. He explained this development, which he did not hesitate to describe as alarming, as follows:

> The sources of our predicament are not hard to discern. Our economic interactions are numerous and complex, and market mechanisms alone set few restraints on such social crime as pollution, industrial safety hazards and consumer fraud. At the same time, we have guaranteed individual rights and freedoms that require painstaking protection. Most fundamental, our native individualism has worn our social fabric thin, leaving virtually no envelopping system of family, community, or custom to guide or constrain each of us — as less mobile, more traditional societies could provide.

> Reversing cause and effect, the atomization of society has triggered an explosion of law.[7]

Hence, Tribe concluded, the need to set up as soon as possible a program aimed at "delegalizing" U.S. society. He proposed various measures ranging from selective deregulation, in instances where regulation had no other effect than to protect industry from competition, to the simplification of laws and the "dejudicialization" of conflicts. While aware that such a program could easily lead to abuses, he nevertheless remained confident that sound planning could ensure the disappointment of those whose only desire was to eliminate *all* restriction of their activities.

A few years later, in 1983, the president of Harvard University and former dean of the law faculty, Derek C. Bok, cited similar concerns in his annual report to that university's board of governors.[8] Concerned about the enormous costs of the existing legal system, and also about what he described as "a massive diversion of exceptional talents into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit," and concerned above all about the inefficiency of a legal system incapable of protecting the rights of a majority of citizens, he proposed a dual approach to correct this situation. Firstly, he proposed a renewed research effort, to assess both the real costs and the efficiency of this legal system. In this respect, he explained, "it will be impossible ever to develop more sensible theories of the appropriate role of law if we do not make greater efforts to examine the effects of the laws we already have." Secondly, he challenged the orientation of teaching in the law faculties, which in his view were too geared toward adversarial approaches. To clarify his thoughts on the future needs of society, he added:

> Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of the most creative social experiment of our time.[9]

Similar observations, directed at a broad public, have also been echoed in other countries.[10] But, expressed in easily accessible terms, they are intended more to reflect concern than to express a new vision of the role and place of law. What makes them significant is the fact that they are based on increasingly articulated theoretic reflection. In the United States, as in Europe and Canada, a growing number of studies, which combine law with other disciplines such as history, sociology, philosophy, political science and economics, are coming to challenge the law seriously as an instrument of economic and social development. Some of these studies, neo-Marxist in orientation or identified with the critical

legal studies movement,[11] go so far as to claim that law in its current individualistic and liberal conception is incapable of maximizing the well-being of society. Other, neo-liberal, studies simply see law as a bad substitute for the loss of the market when it departs from its role of support for the market. In both cases, the result of such reflection is that we hear references to "delegalization," "deregulation" and "dejudicialization" with increasing frequency.

These conflicting conceptions of the law, which, paradoxically, coincide somewhat in their conclusions, are far from accounting for all thought on the subject. In fact, refusing to be confined by this dilemma, a third ideological trend, which might be described as pluralist, falls between the first two: its principal feature is that it is generally open to all viewpoints, which it regards as facets of the same reality. On a more strictly legal level, pluralism advocates a broadened reading of the law, which, in making room for normative modes as varied as a national constitution, statutes, regulations, the courts, contracts, grants, the tax system and even the market (the refusal to intervene being likened to a form of delegation), treats as secondary the question of whether there is too much law and concerns itself essentially with the specific implications of each of these normative modes and their reciprocal relationships.[12] This pluralist approach, which sees itself as scientific in that it requires all positions to be clearly defined at the outset, nevertheless raises the same fundamental question of the role of law in that, open to all viewpoints, it refuses to limit itself to traditional approaches. The outcome of all this reflective activity is that we are presently undergoing an unprecedented "demythicization of law"[13] whose existence this inquiry would be hard put to ignore, though it is intended to focus not on the present, but on the medium and long term. As Harry Arthurs points out:

> Law, in short, is identified as both the cause of, and the cure for, many of the ills of Canadian society. Whether it is either (or both) is an issue that must be addressed. Still it is at least clear that any attempt to assess the past or present, or to predict or prescribe the future, behaviour of the Canadian state, economy or society must confront the issue of law.[14]

It was to learn more about the subject of law that we focussed our research on the context of law and theoretical reflections about it. Ideally it would have been interesting to complete this research with some empirical studies. But apart from the problem of accurately defining the nature and criteria for evaluation of the data to be gathered, the time and resources to devote to such work simply was not there. On the whole we think the results of the research undertaken reflect reasonably faithfully the view of Canadian jurists concerning law as an instrument of economic and social development. What was revealed in particular, beyond a certain uneasiness in the face of the apparent confusion of law,

was a clear conviction that law could again become a useful and efficacious instrument of development, provided only that its limits are recognized and that the best available knowledge is employed in its design.

In making our synthesis, we decided to follow a plan much like that proposed by Harry Arthurs in his study in this volume. Firstly, the emphasis will be on the concept of law, on the ideas developed by the research studies in this section of the legal research, and on the place of the various legal tools such as statutes, regulations, the courts, and contracts. What emerges in particular from this study is that, for most of our authors, law can take a variety of forms whose implications must be clearly understood, for, as Liora Salter points out, "the state fulfills a multiplicity of roles and expectations, each placing conflicting demands on the law."[15] From this standpoint, it is not incorrect to state that most of the research studies view the present trend toward deregulation and dejudicialization with some scepticism insofar as such a simple and global solution strikes them as attaching little importance to the diversity and complexity of the problems faced.

Next we will look at law as a dynamic system for the production, application and revision of standards. To this end, two hypotheses will be considered: one whereby law is a dependent variable, that is, essentially the product of social reality; the other whereby it is an independent variable, that is, the product of a rational and autonomous will acting on social reality. While these two hypotheses, presented as extremes, do not exclude other intermediate and more common hypotheses, it will be understood that, depending on the importance attributed to either, the analysis of law as an instrument of economic and social development will be fundamentally affected. As will be noted, for most of the authors in this section, law enjoys a relative autonomy whose limitations must nevertheless be clearly understood if law is to be used truly effectively.

Whatever the factors that determine the effectiveness of law as a policy tool, the decision to resort to law and, within law, to a specific legal instrument is ultimately a response to a value choice. As Liora Salter points out: "Law and policy always embody value choices. If these value choices can be made explicit, they can aid in developing a framework for some innovative policy recommendations."[16] It is precisely with this question of the relationship between law and values, dealt with differently by each of our authors, that this overview will conclude.

The Boundaries of Law

Our study of law as an instrument of state policy requires at the outset a theoretical reflection about the law's modes of intervention. Not that one can hope to predict with any accuracy the precise efficiency of a given

legal instrument: thus this study is an attempt to establish the boundaries of law, so as to identify more clearly the range of options open to the state and to gain a better understanding of the implications of the trend toward delegalization, deregulation and dejudicialization mentioned earlier.

The Forms of Law

The forms attributed to law depend on its definition and on the role one is prepared to allocate to the state. These notions in turn depend on the preconceptions of those who formulate them, their social status, their professional functions and the relationship of these functions to law.

On the continuum extending from constitutional process, the most stable of all, to pure incentives,[17] or to mere exemplary conduct, lie a great many instruments whose legal nature may be more or less pronounced. No one will deny that constitutional rules, codes, statute law and regulation are legal instruments. But the boundary between legal instruments and civil or political instruments shifts depending on the observer considering contracts, directives, administrative strategies, incentives, unilateral decisions by public authorities, the creation of Crown corporations and arbitration bodies, and finally, the bylaws of volunteer organizations.

This boundary depends on one's definition of law. According to whether one favours a narrow definition, which sees law as emanating from a formally mandated authority and subject to application by courts of law, or a broad definition that encompasses all intervention likely to affect social behaviour, the list of "legal" instruments becomes longer or shorter. While for Roderick Macdonald all these forms of intervention are to some degree legal, for others, such as Arthurs, there is a dividing line somewhere:

> Nevertheless there is a difference between using law and not doing so: to keep down public sector wage levels through tough collective bargaining is not the same as restraining them through legislation; to reallocate governmental responsibilities through constitutional amendment is not the same as doing so through federal-provincial negotiation; to ban or regulate the sale of alcohol or drugs is not the same as inveighing against their use, or selling them exclusively through state outlets.[18]

This debate concerning the forms or manifestations of law is far from recent. Basically, it contrasts two notions of law, one concerned with form, the other with substance. According to the first, legal rules are distinguished from other rules of social life by the public constraint attributed to them by their sanction. From this point of view, legal rules are above all a creation of the state, the outcome of a deliberate will. Initially developed in reaction to "natural law," and inspired by the scepticism of Descartes and the political philosophy of the social con-

tract of Hobbes, Locke and Rousseau, this view, identified in our day with legal positivism, first emerged in the 18th century with Bentham, to be developed in the 19th century by Austin, and finally to find its most developed expression in the early 20th century with Kelsen and his pure theory of law. In contrast to this formalist wave, and also at odds with natural law, is another view, developed from a historical and sociological perspective, which regards law first and foremost as a living, spontaneous phenomenon, the direct outcome of the organization of society. First appearing in the 19th century with von Savigny, who went so far as to see in mores and customary rules not only the initial and most significant manifestation of law but also the expression of *Volksgeist*, the spirit of each nation, this wave of thought was to undergo a marked development at the turn of the 20th century, moving in two different directions, one more strictly sociological, issuing from Ehrlich's school of free law, the other more behaviourist, with Jhering and Pound, and in particular the American realist school. For Ehrlich and his successors, particularly Kantorowicz, Gurvitch and Levy-Bruhl, true law, derived from the internal order of the various groups and associations that make up society, is upstream from formal law, which is nothing more than the end result of a historical formative process. With Jhering and Pound, interest gradually turned toward what was occurring downstream from formal law, that is, at the stage of its concrete application. Based on a view of society as a host of diverse interests competing with one another, Jhering and Pound eventually attributed to law in general, and to the judge in particular, the role of arbitrating these various conflicts so as to satisfy the greatest number and to maintain order. The interest shown by Jhering and Pound in the role of judges was to lead inevitably to an examination of their concrete behaviour by the American realist school, including Holmes, Llewellyn and, in particular, Frank. Frank was to state in this regard:

> For any particular lay person, the law with respect to any particular set of facts, is a decision of a court with respect to those facts, so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence.[19]

Such a concept of law, like that developed by Ehrlich and his successors, came to limit significantly the importance of formal law emanating from the state as a source of law. As will be seen later, this substantive view of law, in contrast to the positivism of Kelsen, was recently returned to a place of honour by Hayek and Unger on the basis of very different premises.

It goes without saying that the two main points of view concerning the concept of law described above, while presented as opposite positions, are actually not at all opposed. In fact, most, if not all, of the so-called substantive theories of law mentioned do not deny the reality of formal

law emanating from the state. What they do dispute is the claim of legal positivism to represent the reality of law fully and completely. In contrast to the positivist viewpoint, described as monistic, the pluralist and substantive theories of law open the way to other manifestations of law that are not specifically public in nature.

The very contrast between public and nonpublic law loses much of its significance, moreover, if one adopts an intrastate concept of legal pluralism, a notion that refers to the diversity of the legal systems recognized by the state, through either direct integration or delegation.[20] By extending this line of reasoning, the various manifestations of nonpublic law are seen as being authorized by the state anyway, through either explicit or implicit delegation (Macdonald's position), so that the distinction disappears entirely. Even if the distinction is retained, as seems desirable to us, recent studies tend to show that close ties connect public and nonpublic law, in the sense that the former is more often than not used as a frame of reference for the latter, which is as apt to complement as to modify, or even contradict, the formal law that emanates from the state.[21] Any study of law as an instrument of state intervention will be hard put to ignore such a reality.

Law and Ideologies

These various conceptions of law are also related to the role assigned to the state and to its underlying values, whether implicit or explicit; that is, to the political ideology one espouses. Of course, a minimalist view of the state is linked, among neo-liberals, to a narrow definition of law, based on the values of personal freedom and economic efficiency, and one can assume that the list of instruments for applying policies that will readily be described as legal is therefore limited. In contrast, those ideologies that favour state intervention and are more concerned about the values of equity and welfare advocate, despite their questioning of law (and, more specifically, of the judicial system), a broader definition of law that in fact includes all tools of intervention within its sphere of application, thus blurring the boundary between its public and private competence.

The merit of some of the studies we present here, notably those of Salter and Arthurs, is that they come one step closer to establishing a link between, on the one hand, these contrasting ideologies, and pluralism as well, and, on the other, social groups, and even the professional roles assumed by jurists. Thus, Arthurs' paper establishes a connection between the narrow definition of law, seen as a mere body of rules, and the advocates of economic "laissez-faire," legal positivism and, more generally, political conservatism. It also establishes a connection between these ideologies and the positions held by jurists, noting their relatively greater numbers among lawyers and judges, who are linked to

the private sector, as compared with a view that sees law as the product of the social context, a view that would be more popular in reformist circles where the interventionist ideology prevails and where a higher proportion of legislators and public administrators is to be found. Between these two extremes, the pluralists, advocates of liberal democracy and a mixed economy, would see law more as an instrument for applying state policy.

These connections not only underline the relationship between professional occupations and status and concepts of law, but reveal the impact of these factors on the choice of instruments, whether legal or nonlegal, for implementing policies. This last point of view coincides to some extent with that expressed, for example, by Belobaba and Weiler in their respective analyses of law as it applies to consumer issues and labour relations, which clearly show the influence of the legal profession on the choice of certain legal forms over others.[22]

The same conclusion is reached by Salter, for whom the choice of instruments for applying state policy, made chiefly from among the various forms assumed by law, depends more on those with the power to choose and their values than on any particular appropriateness to the desired end result. Illustrating her point with an example concerning the regulation of professional corporations, Salter writes:

> The choice between either an administrative or judicial approach, between regulating by regulations or through state-corporate consultation is not a choice between more or less efficient means of accomplishing policy goals primarily. Nor is it random. The choice reflects differing concepts of the appropriate relationships between the state and corporations and thus different value, professional or ideological assumptions. For those who make the decision about whether to use an administrative agency or a judicial process to implement particular policy goals, efficacy or efficiency criteria always seem applicable, and their choice seems unconstrained. Different modes of regulation and different legislation are considered efficient and efficacious, however, in different areas because assumptions differ about how policy should be made.[23]

The Meaning of Deregulation

It is against this backdrop that the debate surrounding "deregulation" develops, a debate which encompasses, in a broad sense, "delegalization," "deregulation" and "dejudicialization" simultaneously. All these concepts emanate initially from conservative quarters, all are based at the outset on a narrow concept of law, on a restrictive use of the term "legal" to describe the means of implementing policies, and all convey an ideology that reformists and pluralists — joined by most of the authors of the studies presented here — challenge even when, in the

name of opposite values, they too are demanding a certain measure of dejudicialization.

In proposing the "deregulation" of certain economic or social activities, that is, the reduction of the activity of the legislator, the executive or the law courts, one must assert, at least implicitly, that there exists a sphere of civil society, the private sector, where "freedom flourishes," where no one else, in the absence of the state, imposes rules, and where conflicts do not exist, or at any rate where they are not arbitrated. One must imagine that the solution that results from power relationships in their pure state is necessarily the best for all, unless the possible convergence of interests protects them from all social arbitration. One must argue for the neutrality of private decision makers, the infallible yet blind science of the market. Monahan convincingly describes this legal ideology and at the same time reveals its illusory side, that of a prepolitical social structure and of the natural legal order generally attributed it:

> The central and governing element in this judicial construct is the assumption that it is possible to identify some natural or prepolitical structure of human interaction in civil society. This structure is natural in the sense that it does not depend on the validity of any particular ideology or political doctrine. In this prepolitical setting, individuals are able to combine with each other free from "regulation"; the outcomes of interaction are the product of their individual life plans and abilities, rather than the conscious implementation of some larger political program. Of course, it is recognized that no such "natural" order of things exists in contemporary liberal democracies, nor should society attempt to recast itself in pursuit of the naturalist ideal. Nevertheless, the belief in the possibility of such a prepolitical structure carries important implications for the judicial analysis of public policy. It means that deviations from what is seen as the natural order of things require some particular justification on the part of the state. The state is interfering with a set of arrangements which is thought to inhere in the "nature of things"; interference of this kind should legitimately be regarded with suspicion. The role of the Court is to ensure that the incursion on natural liberty is warranted in the circumstances.[24]

In this analysis, only the actions — legislative, regulatory, judicial — of the state are labelled "legal" and presumed to be restrictive: once an activity escapes public control, it becomes not only easier for its agent to engage in, but automatically favourable to the aims of society, though these may also be repudiated since they differ according to the groups advancing them. What is more, deregulation would have the effect of easing the social climate, administrative ponderousness, and the congestion of the courts; costs would drop as a result, as would taxes.

This is, in short, the neo-liberal credo, which reflects in its conclusions, if not in its premises, the gradual withdrawal of the state and law foreseen by the early Marxists. But neither in socialist states nor in

Western democracies have we yet seen this political and judicial return to "nature." On the contrary, the rules continue to multiply and the conflicts to endure.

The phenomenon is better understood if one acknowledges at the outset, as Macdonald clearly shows, that there is no legal "no man's land," no private sector shielded from the legal system, no neutral place where human activity, pre-harmonized by intrinsic programming, would spontaneously evolve, to the benefit of all, toward presumably neutral and univocal social ends.

We can better understand what happens when there is "deregulation," or regulation, if the transition from legislation, regulation, or adjudication to their opposite, and vice versa, is likened to the flow of an incompressible fluid between communicating vessels. The deregulated social product flows, not into a normative vacuum, but into another, no less regulated vessel, where it is the private sector decision makers who establish the norms according to what they see to be their advantage, protected from democratic debate, all consequences hidden; where it is the common law, centred on private property and its values, that catches the overflow from statutory recourse and administrative tribunals.

This transfer takes place at the expense of visibility and, consequently, political control (in the sense of accountability), as Macdonald explains:

> Of course, it is not claimed here that there is no difference between various forms of state economic activity; nor is it asserted that governmental initiatives setting the preconditions for a market to operate, cannot in some measure be distinguished from those that impinge upon it. Rather, the point is that if one wishes to understand the patterns of visible regulation, and especially delegated legislation, since World War II, it is inadequate to adopt a view of government initiative that excludes several major forms and objectives of state activity. A failure to elaborate a model that takes into account the entire regulatory environment may well lead to false theses about regulatory growth, when all that has really occurred is the suppression of non-obvious state economic activity and its transmutation into the particular form of visible governmental initiative, which certain modern critics stigmatize as regulation.[25]

Similarly, when this deregulation occurs at the institutional level, notably by seeking, paradoxically, to gain greater control over administrative tribunals, the authors all point out the loss of flexibility and adaptability that results. Mullan agrees with Macdonald here, the former emphasizing the flexibility of administrative tribunals:

> In situations where the task at hand involves adjudications of the type conventionally carried out by the courts, arguments for freedom from political interference and decision making by independent and impartial decision makers assume greater force. On the other hand, in matters of high political and social regulatory concern involving broad discretionary

> authority, it is neither surprising nor undesirable that the regulatory or tribunal process involves varying degrees of interaction with other areas of our governmental system. In this respect, there is much weight in Ratushny's assertion: "The absence of uniformity represents a tremendous flexibility in the administrative process which is its greatest strength."[26]

The latter clearly shows the negative impact of traditional judicial control on this same flexibility:

> What is worth noting, however, is the conflict of interests that judicial review presupposes. Reviewing courts have never tolerated from administrative decision makers the same flexibility as they do from judicial decision makers.[27]

More essentially, in reading the works of Arthurs, Macdonald, Weiler and Salter, one will note that the fact of attributing a less arbitrary, and consequently less constraining, character to legislative and judicial interventions than to administrative tribunals basically reflects a particular viewpoint concerning the role the state should play in the private sector. In the words of Arthurs, "it is entirely understandable that those who want the state to intrude into the domain of private action should opt for the administrative model as the most effective method of intrusion, while those who are resisting regulation should oppose it for that very reason."[28]

If, however, one accepts a broader definition of law, if one recognizes the legal nature of the contract, the decision, or private economic interventions, if one compares their definitiveness with respect to social consequences to the flexibility and often ephemeral nature of regulations and even of laws, one is forced to conclude that little ever escapes regulation. Only the regulators and their method of regulation change.

We have only to consider a few concrete examples to be convinced of this. Which has the more restricting, more lasting, more general effect: a zoning regulation, modifiable at will by a town council that may meet every week or the deregulated decision of a private promoter to build a toxic waste depot or even a concert hall on a specific site? Of the two, which better meets the definition of a law, leaving aside the source of the power being exercised? Thus Makuch speaks of zoning as a "facade for the extra-legal techniques . . . that have grown up to control development."[29]

When the state deregulates international trade by doing away with customs duties, do goods automatically circulate more freely or is not their control just as effectively assured by production grants, various technical regulations, or even campaigns promoting the purchase of domestic products? What has been GATT's concern for so long but to abolish the barriers that sooner or later reappear in another, better disguised, less "regulatory," and more "private" form?[30]

Another example of the same phenomenon can be found in Canadian

constitutional law in the federal-provincial agreements. Even though these have no legal character they often (according to Kenneth Wiltshire) constitute "a method of altering the balance of powers in the federations without resorting to any formal constitutional amendment."[31]

In this context, deregulation, delegalization and dejudicialization, and the general resort to so-called non-legal modes of intervention seem to be just what they are: an ongoing metamorphosis with respect to form without ever completely eliminating the constraints. To transfer the process from the relatively transparent vessel of the state to the more opaque one of the private sector often reduces its visibility and enables private interests to bend it more easily to suit them. It does not, however, eliminate the constraints. While not always spelled out, this view of deregulation as a mere displacement from one sector of society to another underlies all the studies in this phase of the research.

The broad consensus that reigns in this regard is striking. The authors we asked to analyze the evolution of the various elements of administrative law and those who have commented on this subject in passing (either in more general studies about the instrumentality of law or in more limited analyses about specific spheres of collective activity) largely concur in denouncing the illusions of deregulation. Not because it is intrinsically harmful or even will not have certain benefits, but rather because, having become a catchword, it may be used in such a way that its harmful effects risk outweighing any expected benefits.

This near unanimity is all the more striking as it brings together authors whose personal value choices and respective fields of law fall within separate ideological movements that are, if not divergent, then at least quite varied, ranging from legal positivism and social conservatism through the social contextualizing of law to neo-Marxism. In these circumstances, their common message assumes special significance. Briefly, they are unanimous in recommending that we "not throw the baby out with the bath water." However, we shall go a little further and present the main elements of their contributions.

Arthurs, in addressing the question of the extensive relationships between law and society, clearly shows both sides of the coin:

> On occasion, we may witness what might be called "hyper-regulation." In effect, a regulatory regime may overreach its mandate and seek to impose itself on conduct or persons at which it was not initially directed. This phenomenon could result from a careless misreading of the governing statute but is as likely to be a response to some unusual social, political or bureaucratic stimulus. A new and unforeseen danger appears, or a radical shift occurs in public demand for control of a long-persisting problem, and an existing regulatory regime is called upon to make a speedy response, as the only device the government has to hand. Or, as the result of some bureaucratic imperative, including zeal for the public welfare, a regulatory regime decides to embark upon unfamiliar, and unauthorized, ventures.

More familiar than "hyper-regulation," however, is its opposite: "hypo-regulation." This may result from administrative timidity, sloth, ineptitude or capture, or again from a misunderstanding of what a governing statute permits or requires. But these are not likely situations. Almost always, regulators operate in an internal economy of scarcity: they lack the staff, powers, knowledge, or public support to ensure perfect and perpetual compliance with regulatory objectives and standards. Confronted with the impossibility of securing compliance in all cases, they may opt to address only egregious violations, important cases, test cases whose outcomes may clarify dubious interpretations or be regarded as typical of an entire class of cases, uncontroversial and innocuous cases, randomly selected cases which fortuitously come to their attention, or none at all.

When cases are addressed, moreover, they may be dealt with in ways other than by protracted, resource-consuming, and not necessarily effective formal proceedings. Rather, they may be dealt with informally, so that total or partial compliance may be achieved through threat, admonition, persuasion, negotiation or even benign neglect.[32]

This image of the reverse side of the coin will become clearer in looking at the studies that deal specifically with administrative law.

The most extensive study, as we have already pointed out, is that by Macdonald, on regulatory law in Canada since 1945. It bears another look as much for the quality of the analysis as for the paramount importance of the subject, focussing specifically on society-state-law-economy relations at this stage in Canada's development:

Much so-called deregulation could be accomplished expeditiously. . . .

Yet these suggestions are not without their costs. For example, do they commit us to a further erosion of shared commitment in our political culture? Do they require transformations of the social relationships they govern, that are out of proportion to the benefit they generate? In other words, to understand the true potential for regulatory reform, it is necessary to begin by hypthesizing a social *tabula rasa*, where there are no markets, no courts, no explicit legal rules, and no administrative agencies.

However powerful an engine for political and social development economic efficiency may be, political theorists have never adduced it as the dominant justification for the political state. Typically, other values such as justice, fairness, equality and liberty preoccupy philosophers. That is, both "markets" and "price and entry controls" are political commodities. Our choice is not between free markets and regulated markets. It is between various strategies for economic regulation where the market is only one option.[33]

From a more positivist analysis of the respective performance of administrative tribunals and the traditional judicial system, David Mullan reaches a similar conclusion, though expressed in different terms, concerning the plethora of administrative tribunals that is often said to accompany the proliferation of rules.

Going beyond the traditional arguments raised in support of adminis-

trative tribunals — namely, the settlement of conflicts outside the judicial forum in a socially more suitable context, by bodies both more competent than the courts in technical matters and more politically neutral than administrative systems — he writes:

> If there is a clinching argument for the creation of administrative tribunals, it lies in the need for the dispersal of power in a system which would otherwise (and perhaps even despite administrative tribunals) contain too much concentration of governmental authority in a limited group of actors: Parliament, the executive, the civil service and the courts.
>
> The creation of administrative tribunals has at least the healthy tendency of distributing political power somewhat more evenly throughout the various constituencies that make up our nation. This is particularly so when the establishing of an administrative tribunal is linked with greater openness and direct participatory rights than are associated with the traditional forms of government.
>
> Moreover, aside from considerations of democratic values, systemic factors also indicate the desirability for administrative tribunals, at least as an antidote to and variation upon the traditional modes of government. In a pluralistic society with complex governance problems there is obviously room, indeed a need, for flexibility and variety in the modes adopted for the handling of societal problems. To the extent that the functioning of traditional institutions (the legislature, the courts, civil service and, to a lesser extent perhaps, the executive) is hidebound by tradition, rendering effective reform a virtual impossibility, the administrative tribunal, particularly given the diversity of its form, presents an important possibility for effective governmental decision making. In this regard, the advocates for constitutional purity and the worriers over the anachronistic qualities of administrative tribunals are sadly misguided. Obsolescent theory has prevented an adequate vision of the potential of diversified decision-making mechanisms. A single, uniform mould never was and never can be appropriate to administrative tribunals in our society.
>
> . . .
>
> The best of administrative (and in particular major regulatory) tribunals also add another dimension to the possibilities of government in that they offer the opportunity for an accommodation being reached between a number of often competing values in our society: legal, political (in its less than best sense), technical, economic and social. Given an appropriate configuration of tribunal decision-making powers, there may well be a much greater chance of that kind of decision making than is presently given by the other agencies of our governance.[34]

For Patrice Garant, who has had a longstanding interest in Crown corporations and recommends many reforms in their regard, the question of their multiplicity never even arises:

> I still believe that Crown corporations, in spite of the faults and deficiencies of the present system, are irreplaceable instruments for implementing cer-

tain economic policies of our governments. The system can be perfected and improved if reforms are carried out in an enlightened and careful manner. [Translation][35]

Like all positivists, he obscures the basis of his claim, but the least that can be said is that it is compatible with those made by the other authors: if Crown corporations are irreplaceable, it is precisely because their replacement by private corporations does not eliminate the decisions that bring control, but merely changes those in control. To force their activities into the private sector is simply to give private-sector agents the opportunity to decide social objectives and priorities, implicitly yet undeniably linked to the decisions of these corporations. This does not cause Garant to challenge the existence of Crown corporations but rather to suggest corrective measures. But here again, the phenomenon of the communicating vessels comes into play: what is won in terms of political control is lost in terms of the flexibility and adaptability of these corporations to the market.

This phenomenon has not escaped the notice of Stanley Beck, who analyzes the relations between the power of commercial corporations and the control that the state attempts to impose on them through its policies. From this very specific viewpoint, he reaches the same conclusion as those who confronted the question head on:

> The matter has been cogently characterized by Lindblom. In a private enterprise market system, such critical matters as the distribution of income, what is produced, the allocation of resources to different lines of production, the allocation of the labour force to different occupations and work-places, plant locations, investment levels, technologies used in production, the quality of goods and services and innovation of new products, are all matters that in large part are decided by businessmen. Yet they all are matters of great economic and social significance. They are, in a real sense, public policy decisions and to the extent they are made or shaped by business leaders, such leaders exercise a public policy function. Moreover, there is a significant degree of discretion involved in making such decisions, and although the market may exercise a significant degree of control, it by no means dictates the outcome.
>
> . . .
>
> Although the quantity of regulation and direct and indirect government involvement in the economy has increased, and business now has a real sense that it is over regulated and has lost a degree of freedom to act, to conclude that the corporate sector is effectively controlled by government is to misunderstand the nature of our private enterprise economy. If it is largely left to private enterprise to make the critical public policy decisions that were described at the beginning of this paper, then government policy must ensure the success of private enterprise. If government policy fails to do so it risks detrimental effects on the economy and thus on the citizenry

whose welfare it is the chief function of government to advance. If corporate decisions (the fact of discretion must again be emphasized) affect jobs, investment, prices, wages, community stability (e.g., Sydney, Schefferville, Sudbury, St. Catharines, Thompson, Calgary, Port Alberni and Powell River), interest rates and trade balances, they are in fact "governmental" decisions. Thus, government must, to a significant degree, be acquiescent to the needs and demands of business for to do so is to do no more than to provide good government. Of course, to the extent that major public policy decisions are made by non-representative and thus non-accountable actors, they are removed from democratic control.[36]

This result has been noted in other areas: when disruptive events occur, such as the closing of a mining town, the rapid decline of an industrial sector, or an ecological disaster, events whose consequences threaten the social peace and, consequently, the climate necessary for prosperity, the state must intervene and "correct the excesses of capitalism" or "iron out its contradictions," according to the vocabulary dictated by the ideology of reference. Here it is not public rule that overflows into the sphere of private decisions, but private decision making whose consequences overflow into the system of state intervention.

The present prevalence of neo-liberalism in most Western states, while it shows the best side of the delegation to the private sector of powers previously exercised by the state, also entails real dangers in terms of social costs and the political problems likely to result from the value choices it represents. As was underlined earlier, these choices are implicit, and their consequences will not have previously been assessed.

It is doubtless in the sphere of social law that the negative effects of deregulation are most foreseeable. Bureau, Lippel and Lamarche are clear on the subject:

> The past years have also been characterized by a return to traditional values such as private enterprise and volunteerism that coincide with the swing to the right that has brought to power, in a number of Western countries, conservative political parties. To this it must be added that the political and social demobilization since the late 1970s has slowed the wave of demands and will reduce the need to mitigate certain social tensions. These factors doubtless explain a certain disengagement of the state, at least a slowdown in social investments and a number of cutbacks, despite the increase in the collective wealth and the steady rate of growth of large corporations in terms of assets, resources, sales and profits.
>
> In these conditions, and if the trend continues, there is no doubt that social law could emerge as the law of *inequality*. [Translation][37]

This is why delegalization, deregulation and dejudicialization, in order to constitute valid choices, must be fitted into the entire range of normative modes available to the state. Only on the basis of a true understanding of the characteristics of each of these modes and of their implications with respect to values (freedom, efficiency, equity, flexibility, democracy, responsibility) can enlightened choices be made.

Toward an Expanded Conception of Law?

It remains to see how our studies of specific fields of law reflect these concerns. Generally speaking, from an analysis of the various modes and locales of legal intervention, they often lead to less formalist and less conflictive solutions. More closely concerned with the concrete activity law attempts to govern, these studies focus attention on the basic content of the policies that law is intended to support. It is to the credit of all the studies assembled here that they underline the shared boundaries of these seemingly heterogeneous, but basically interdependent spheres of law. That this overlapping between the private and public law, the boundaries of which are fading, is materializing in a similar way between the more formal and more informal forms of law further illustrates the image of the communicating vessels.

Observing that the decisions taken by corporations with respect to the nature of production, the distribution of income, investments, and technological development are in fact, whether we like to admit it or not, political decisions, decisions of "public policy," Beck seeks the means to make private enterprise aware of the sociopolitical dimension of its role:

> An opening of the board to representative constituencies and greatly increased disclosure would be a step in the direction of legitimizing public power and might lead to an amelioration of the worst abuses of that power. However, the large, public corporation would remain as a major power centre in our society, matched only by government itself. The power is of a scale that raises a basic question for democratic theory. What is the origin of the mandate from the governed? We know the answer to that query, but it is not one that we wish to acknowledge. Moreover, as has been suggested, government must accommodate, as much as regulate, that power if it is to govern effectively.[38]

He proposes a range of specific legal forms for achieving this. In addition to the opening of boards of directors to the groups targeted by their decisions, he recommends publicizing the debate surrounding major concerns such as the concentration of capital in the media, foreign investment, and corporate funding of cultural and educational activities. Similarly, opening the panoply of "informal" instruments, regarded by some as sublegal, he seeks, on the part of the government, increased consultation with the business community, and calls for continuous consideration of the full range of possibilities that must be constantly assessed in relation to each other, with full awareness of their relativity:

> The problem of corporate power and public policy is a polycentric one. There are no solutions in our economic system, only a range of possibilities. One that is most likely to prove most rewarding for society as a whole, is a more sophisticated understanding of corporate power and what it entails, and greater recognition by government of the need to come to terms with

that power. Political theorists and believers in political pluralism may see dangers in that, of course, but it is probably the only way effective solutions can be found to the changing economic and social environment we face.[39]

Belobaba reaches the same eclectic, relativist, pluralist and realist conclusions at the end of a study he conducted on the possible use of law in the area of consumer protection:

> The accumulation of common sense, contradiction and confusion that has riddled almost a century of federal and provincial law-making is coming to a head. In product safety, information and advertising, trade practices, consumer warranties and access to justice, the cozy concepts of yesterday are beginning to confront the constitutional, theoretical, conceptual, empirical and structural constraints of tomorrow.
>
> The conclusion? There is none, or at least not one. There are many. We have attempted to identify them to provide both long-term objectives and short-term initiatives. There are no single answers. No simple solutions. Consumer policy making is becoming an increasingly complicated phenomenon. If we are to meet its challenge, we have to begin to learn to live with contradiction, confusion, doubt, passion, uncertainty. And we must do this without letting the nihilist problematic paralyse even incremental advances. We have to encourage a major shift in both the direction and the design of the modern policy-making paradigm. Indeed, we may have to articulate and endorse a new paradigm in the Kuhnian sense, a paradigm that is truer to the realities and complexities of modern policy making and modern politics.[40]

It is a plea for an incremental approach centred on solutions that are made-to-measure, solutions that take into account the findings of contemporary research and are characterized by their openness to informal instruments, notably the diffusion of information and participation. But his outlook is critical enough to deny the absoluteness of any simple, exclusive solution.

This approach is, moreover, the one to which the epistemology of science leads, by an entirely different route rarely taken by legal experts, as Ronald Lévy explains in a text that has the distinction of summarizing in a single paragraph three centuries of history and the resultant pluralism:

> In effect, the three principle Cartesian analytic axioms based on reductionism (or disjuctionism), neutrality (or externality) and determinism (or causality), have been replaced by systemic axioms based on constructivism (or conjunctionism), non-neutrality (or internality) and recursivity (or regenerativity). In other words, the traditional "one" method, (i.e. that there is one unique solution and therefore only one correct method of uncovering reality), and the "zero" method, (i.e. the method of critical scepticism in which no judgment is made, nothing is determined and to every argument there is an equal and counter argument — Kantian dialecticism), have been replaced by the "many" method which allows for all possibilities without bringing them into essential conflict.[41]

The studies of Weiler and Emond contain similar suggestions, this time formulated in institutional terms, for an intermediate place for mediation. Weiler, in his study on labour law, proposes: "A legal policy that is directed at assisting the parties to reach voluntary settlements rather than at producing winners and losers at adjudication is more consistent with the needs of their ongoing relationship."[42] Emond also suggests greater use of arbitration mechanisms at the level of decentralization where conflicts arise.[43]

In his study on family law, Payne also refers to arbitration as an alternative solution to the litigation process. Clearly the choice of forms, here institutional, of law is not unrelated to the content attributed to it by those making the choice, a content that will be affected by their values and ideological stance. In fact, his paper describes very clearly the process (similar to that set out by Beck with regard to the transformation of corporate power) whereby family law, formerly in the private realm, now leads to the statutory formulation of economic and social policies in support of individuals suffering from family breakdown:

> It appears clear, therefore, that the private family law system, standing alone, cannot buttress any particular family form. At best, it can only seek to provide a pragmatic and reasoned response to the competing demands arising from sequential family relationships. Whether the public law system can devise clearly defined policies that will improve the quality of life for Canadian families is a debatable issue. Quite apart from the limited availability of public funding, opinions will differ widely as to the aims and priorities that should be assigned to the allocation of public funds and how these aims and priorities can best be achieved. It is doubtful, for example, whether improved child care facilities or affirmative action programs can effectively counterbalance the economic vulnerability of separated or divorced mothers. When 85 percent of all divorces result in the mother's assumption of the day-to-day responsibility for rearing dependent children of the marriage, compromises have to be made by custodial parents between their paid employment and their child-care responsibilities, and these compromises by their nature tend to impact adversely on career advancement. Concepts of shared parenting and job sharing are in their infancy and are unlikely to produce any immediate positive impact on the status of women in the labour force, although their potential offers some promise for the future.
>
> In summation, the economic crises provoked by the breakdown of marriage are unlikely to be resolved by the private family law system or the public law system. Although the concept that marriage constitutes a basis for economic security for a dependent spouse is no longer tenable, the answer does not lie in the legal system but in the development of coordinated policies that will facilitate economic viability through job security and equal opportunities for career advancement for all Canadians, whether male or female.[44]

The boundary between public and private law is fading, laying bare both the economic and political implications of corporate decisions and the connection between the social interdependence of individuals and the need to take this interdependence collectively into account at the policy level.

Finally, what emerges from this reflection on the modes used by law to intervene is a distinctly broader perception of law, a perception that, notwithstanding clear disagreements as to the legal nature of certain types of intervention, draws law closer to its economic, political and social context, and thereby gives it a new dimension. In this regard the authors clearly point out the interrelations that are developing between the various forms of regulation, formal and informal, private and public, of economic and social activity.

This enlarged perception of law is a new phenomenon in Canada and is evidence that legal positivism is losing ground here. The formal logic underlying the traditional view is challenged by a more pragmatic approach which is interested in the actual impact of law and in its efficacity as an instrument of economic and social development. This view is not far from that enunciated by Chief Justice Brian Dickson of the Supreme Court of Canada at a recent conference:

> The court must always be aware of the underlying principles and practical consequences of questions before it, paying close attention to the policy aspects of each issue and avoiding mechanical legalism in coming to its decision. . . . The coming years will undoubtedly see the Supreme Court play a major role in shaping the legal, moral and social contours of our country.[45]

Whether or not one agrees with this position, the relationship between law and social reality must be examined more closely.

Law and Social Reality

As will have been noted, the concept of law can be understood in very different ways, even though the traditional opposition between formal law and informal law, or public law and nonpublic law, is being increasingly challenged in the face of a reality that places them in a situation of interaction. Behind these diverging viewpoints, however, a fundamental debate is emerging concerning the autonomy or dependency of law as a dynamic system of intervention. Depending on whether one believes that the state has the monopoly over law or, on the contrary, that there exist on the fringe of the state other institutions and intervenors that autonomously develop and impose their own standards and values, both outside the state (nongovernmental agencies, multinational corporations, and so on) and within its sphere of influence (professional corporations, labour unions, businesses, groups of individuals,

and so on), one's view of the real autonomy of law, of its capacity as a product of rational will to attain desired objectives, will be quite different. To illustrate the possible divergent viewpoints in this regard more concretely, it may be useful to take a look at the positions held, firstly, by Hayek and Unger and, secondly, by Kelsen and Hart.

A number of years ago, F.A. Hayek,[46] drawing on some of the historical concepts of law described earlier, distinguished between two types of social order, one spontaneous and the other superimposed, and warned against what he considered to be a dangerous tendency to recognize as law only those rules established and applied by the state. Convinced that law could only be a reflection of existing spontaneous norms, he denounced in particular the idea, strongly held by positivists, that any social planning could be achieved by means of law. Considering the spontaneous order par excellence to be that order defined by the rules of the market, Hayek thus affirmed the existence of an indissociable link between law, individual freedom and private property, reserving as the sole area of state legislative intervention police laws in general, government structuring and control, the correction of market inadequacies, and the provision of certain services of fundamental importance to a few deprived minorities.

More recently, Roberto Unger used the distinction suggested by Hayek to assert that if law, in its current phase of development in Western countries, which he described as post-liberal, saw its positivist, general and autonomous nature increasingly eroded by the advent of welfare law and the development of state corporatist law, this should be interpreted as a manifestation of clear dissatisfaction with the overbearing and hierarchic nature of the traditional liberal order. This led him to conclude:

> What is ultimately at issue is therefore the positive character of law itself: whether or not significant reliance will be placed upon made and articulated rules as opposed to imminent and implicit custom. And behind this conflict of types of law lies a more general antagonism between forms of social life — one for which order is a spontaneous byproduct of interaction; another for which it represents authority imposed from above or outside.[47]

Unlike Hayek, however, who proposed a return to a common law interpreted by judges, and unlike certain reformers who felt that the solution to this problem lay in the development of consultation and participation procedures, Unger recommended the more radical solution of a return to a customary law determined in an egalitarian manner by autonomous associations.

Counter to this current of thought, which led to a vision of law as a dynamic system characterized by its heteronomy, Kelsen and Hart proposed a dynamic theory of law characterized by its autonomy. For Kelsen,[48] law, as a system, must be examined and understood without reference to its objectives and functions. Any norm of a legal nature,

whatever its content, must necessarily be established by a specific act of creation, itself authorized by a higher norm. At the very top of the pyramid, building from the intervention of judges and police officers to the constitution, is a basic norm that is authorized by no other, a norm that is presumed rather than established. All that this system of norms stipulates, is that in certain conditions a measure of coercion should be applied. From this perspective, law is seen as a dynamic system in that the content of a lower norm must always be within the bounds established by the creator of the norm immediately above it, in a process that flows from the most general to the most specific. As for the basic norm, whose validity is related to its effectiveness, it in turn conditions the validity of the entire system. This being the most controversial aspect of Kelsen's theory, it was abandoned by Hart[49] in favour of a dynamic vision of law involving primary rules of law (that is, rules directly creating obligations) and secondary rules of law (that is, rules conferring powers: powers of amendment, adjudication and recognition). According to this theory, a primary rule of law is valid and exists insofar as it meets the criteria established by a secondary rule of recognition, each legal system having its own rule or rules of recognition. Unlike the basic norm of Kelsen, however, the rule of recognition proposed by Hart is seen as an observed social practice rather than as a presumed norm. Thus, according to Hart, the rule of recognition in the United Kingdom is that everything the sovereign decrees in Parliament is law.

In considering such divergent points of view, it will be realized that to question the autonomy or the dependency of law as a normative system is also to question the role of the state in society and the economy. From this standpoint, it is interesting to note a certain similarity between the evolution of theoretical thought about the nature and role of law as a normative system and the evolution of political thought about the role of the state in society. In an article published in 1984, Stephen D. Krasner[50] distinguishes three successive periods since the end of the 19th century that have marked the evolution of the thought of U.S. political scientists about the role of the state in society. The first of these periods, which he describes as extending roughly from the latter half of the 1800s to the end of the 1950s, is characterized by formal legalism: "Formal legalism virtually identified political life with the state understood as an institution that promulgated laws and stood in a superior hierarchial position to other parts of the polity. Formal rules were seen as independent variables."[51] This first period, it will be noted, corresponds closely in its orientation, not to the emergence of legal positivism as a philosophy of law, but to its development with Austin and its definitive formulation by Kelsen and his followers.

The second period described by Krasner extends from the end of the 1950s to the mid-1970s. During this period, he points out, "the term state virtually disappeared from the professional academic lexicon. Political

scientists wrote about government, political development, interest groups, voting, legislative behaviour, leadership, and bureaucratic politics, almost everything but the state."[52] This new trend, described as pluralist, corresponds, as far as law is concerned, first to the emergence of the American realist school and its behaviourist approach at the start of the century, and, after an eclipse, to the period from the early 1960s to the early 1980s. This period was characterized by a rediscovery of law seen as a social phenomenon and by an accelerated growth in the number of studies about law in action, to the extent that in the early 1980s, Iline H. Nagel was able to assert: "Law in action research has almost entirely lost sight of the most obvious dimension to consider — the law itself."[53] But this development, it must be noted, rather than being the mainstream view, which remained marked by legal formalism, was found chiefly in progressive law schools.

The third and final period described by Krasner covers the last ten years and is characterized by a renewed interest in the state seen as a variable that is both independent and dependent. This new trend Krasner sees clearly illustrated by Eric Nordlinger's work *On the Autonomy of the Democratic State* (1981), in which the author showed that the preferences of the state "were at least as important as those of civil society in accounting for what the democratic state does and does not do."[54] Subsequently, Krasner, referring in particular to studies by Skowronek[55] and other works published by the United States Social Science Research Council concerning the development of national states in Western Europe,[56] presented a second facet of this new trend, in which the emphasis is placed on changes in the national and international climate and their impact on the institutional and legal structures of the state, rather than on the political actors and administrators of the state themselves. The principal conclusion that emerged from this second trend is that the basic structures of the state, that is, the administrative apparatus, legal order, and political beliefs, have a considerable impact on the state's ability to adapt insofar as they limit its choices, such that the main modifications to institutions are made not so much in a continuous fashion, but rather in response to crises, whether they be internal or external.

With respect to law, a certain similarity can be seen between this third period and the theoretical efforts made since the late 1970s to achieve a better understanding of the fundamental changes that are occurring in law. Starting from a common observation that law is in crisis, various authors have proposed theories to explain this development, some placing emphasis on the interrelations between law and social structures, others on the internal dynamics of law, and yet others taking a middle road. Thus, for example, in a recent study Gunther Teubner[57] proposed an evolutionary theory of law that offers a new interpretation of the statement that law is both a dependent and an independent variable. He

identifies a new type of legal structure, which he describes as "reflexive law" where law, rather than assuming responsibility for defining social objectives, limits itself to implementing, redefining or correcting democratic self-regulating mechanisms. Such an approach, explains Teubner, "requires the legal system to view itself as a system-in-an-environment and to take account of the limits of its capacity as it attempts to regulate the functions and performances of other social sub-systems."[58] However, beyond such theorizing on law, what truly characterizes legal writing in recent years is the advance of a much more nuanced view of law's autonomy in place of legal positivism, which is clearly losing ground.

Indeed, if we turn now to the studies in this section of our research, we note immediately a similar retreat from traditional legal positivism. This is not to say that their authors are seeking to develop a new theory of the relation linking the state, law and society. On the contrary, with only a few exceptions they approach the problems raised from an essentially pragmatic point of view. The simple truth is that for most of them law is no longer the totally autonomous system described by Kelsen, encompassing under one hypothetical, basic norm all norms actually imposed by the state, norms that jurists, in their capacity as jurists, can only describe without ever attempting to evaluate and judge them. For our authors law is rather a dynamic system, subject of course to social forces, but also endowed with its own instruments and logic. As Guy Rocher writes:

> Law enjoys a certain autonomy insofar as its development and interpretation are based on a rationality and logic specific to it. But this autonomy is relative, since the development, interpretation and application of law take place within processes in which other forces are at work: power strategies, the interplay of interests and pressures, inspired by the attitudes, ideologies, and values of all those participating in these processes in one capacity or another. [Translation][59]

Another perception, shared by most of our authors, may be superimposed on this vision of things. Looking beyond the process, it is concerned more specifically with its outcome, that is, with the content of law. This perception, expressed in terms of varying explicitness by a number of authors, is summarized perfectly in the concise phrase of Patrick Monahan: "Law is constituted by social reality while at the same time constituting it,"[60] or again in this claim by Guy Rocher that "while law is undoubtedly passive and a mirror of society and its culture, it is also an active agent, an intervenor, a driving force in the organization and evolution of society" [translation].[61] Thus, with respect to both process and content, law is perceived more often than not by our authors as both dependent and independent variable. It is precisely in relation to this contrast between law as a product of social reality and law as an

agent of change of that reality that their concepts of law as a dynamic system of norms will be discussed in the following pages.

Law as a Product of Social Reality

The claim that law is essentially the product of social reality may be understood in a number of ways. To simplify the discussion, we will look here at the two concepts described earlier, one focussing on the elaboration of law and the other on its content.

With respect to its elaboration, law may be perceived as the product of numerous power relationships within society. "It is . . . at this stage," writes Guy Rocher, "that we see the jockeying for influence or powers, lobbying, various intervention strategies, ideological alliances and alignments of convergent or divergent interests" [translation].[62] Depending on the significance one attributes to these power relationships in the formulation of law, one will draw different conclusions about the autonomous or dependent nature of law.

The most absolute position, in this regard, is that adopted by Robert Bureau, Catherine Lippel and Lucie Lamarche in their study of social law. After first recalling that during most of the 19th century, "individuals who, for one reason or another, were unable to meet their own needs, were taken in by their families, by charitable or welfare societies or institutions and, in some cases, by the local or municipal authorities, by virtue of an implied delegation by the state" [translation],[63] they explain the transition that occurred in the early 20th century as follows: "It is at once the demands, the pressures of the workers' movement, the interests of capitalists and the state of the power struggle between the two that explain state social interventions in the early 20th century" [translation].[64]

But this new evolving social law, while it broke with the traditional notion of private assistance by introducing the principle of direct monetary assistance (*Old Age Pensions Act* of 1927), still ignored the majority of employable people whose income was inadequate or who were excluded from the labour market, and a great many of those who were unemployable. The crisis of the 1930s, in forcing the state to intervene to take charge more systematically of certain social problems, led however to the introduction of corrective and regulatory mechanisms in the capitalist market economy structure, accompanied by social measures to meet the most pressing needs. Soon after the Beveridge Report in England and the Marsh Report in Canada, both the state of need and the social risks related to employment came to be recognized. However, such a development, point out Bureau et al., was still "the product of a society, of its history, of its values, of its economic structure and of the many power relationships that evolve in space and time."[65] In this sense, the evolution of social law during this period seems to them intimately

related to the resolution of a fundamental conflict between the interests of capital and the interests of labour, a conflict that had become intolerable for the principal victims and that compromised the preservation of the system that had spawned it. While they do not deny that social legislation can effectively correspond to humanitarian and welfare objectives for those for whom it is intended, their analysis shows that it also fulfils other functions, which are often obscured by the introduction of justificative reasoning.

Turning to the period 1940–84, which they describe as being characterized initially by the search for stability and the promotion of industrial harmony, then by the war against poverty and the introduction of the concept of minimum income security, Bureau et al. show that beyond their stated objectives, the policies in question were initially economic tools intended to fulfil the dual role of increasing purchasing power and controlling the labour market, all in the interest of capital. What is interesting, however, about this part of their study, which they develop fairly extensively, is that the authors almost manage to convince us that law, while still essentially the product of power relationships within a society, is not for all that consigned to a purely passive role, for they conclude that if the governments in power had truly wanted to, they could have eliminated the state of need. In this sense, their perception of the real autonomy of law, in the creation of norms, may actually not be so far removed from that held by most of the other authors.

A good many of them, in fact, without completely sharing the view of Bureau et al., readily acknowledge that private enterprise exerts an often decisive influence on the elaboration of law. In his essay on consumer law, for example, Belobaba points out that one of the major influences in the formulation of this law has been "the presence of an imperfect but increasingly sophisticated business lobby that has managed to shape the timing and direction of consumer policy making in Canada for decades."[66] In the final part of his study, where he tackles the fundamental problems of consumer law, Belobaba, clarifying his thought, writes:

> Nothing in the nature of the Canadian political process suggests anything less than a privileged position for business in the formulation of modern policy. Indeed, as was noted earlier "almost every important piece of postwar consumer legislation has been opposed by some segment of the business community." Major consumer initiatives at both the federal and provincial levels have been diluted, delayed or totally derailed by the vociferous and articulate opposition of business.[67]

Belobaba concludes by asserting that the reform that is absolutely essential, in the field of consumerism as elsewhere, is reform of the political process. Law nevertheless retains a certain autonomy in his eyes, for despite the opposition of business lobbies, and in the absence

of a strong consumer movement, he acknowledges that a relatively large body of laws has been adopted to protect consumers.

This question of the influence of the business community in the formulation of law is taken up and developed by Stanley Beck in his study "Corporate Power and Public Policy." Concerning himself in particular with the attempts at reforming tax laws and the law governing competition, Beck, after showing the close ties between the business community and the media, arrives at the following conclusion:

> The story of tax reform, in spite of a massive background study and much broader public debate, is essentially the same as the story of competition policy reform. The debate was dominated by public corporations which saw their vital interests threatened. The media, as a part of the dominant corporate complex, cast its weight in favour of the corporate case and against legislative change. Most importantly, the media, by repetition of corporate concerns and threats, generated public concern over loss of investments and consequent loss of jobs. In the face of such opposition, and in a context where the voice of competing interest groups was heard and reported only dimly, if at all, government backed away from reform.[68]

But if the business community, owing to its close ties with the media and to its numerous associations that act as so many pressure groups, manages to exert a decisive influence on the evolution of law, the blame, points out Beck, rests first with the government. A more accurate assessment of the extent of the power held by the business community, he suggests, would enable the government to develop approaches at once better informed about the concerns of this community and better prepared to withstand its pressures. Beck too refuses to see law as solely the product of power struggles in society: an independent will, that of the state, can arbitrate these conflicts and have an impact on the evolution of law.

This last conclusion coincides largely with that emerging from Morin's study "The Use of Legislation to Control Labour Relations: The Quebec Experience." After making a complete census of 44 years of labour legislation in Quebec, from 1940 to 1983, he attempts to ascertain the demands of labour and management with respect to these interventions, and the responses of the political parties and governments. Justifying his approach, he writes:

> Perhaps more than in other areas, labour laws are never isolated works emanating directly from the sole will of the minister responsible and an abstract view of workplaces. Each of these legislative interventions produces multiple and at times contrary effects on the parties concerned and may also affect employment or the dynamism of entrepreneurs, and so on. For these reasons, every labour law generally results from demands by parties or of one party or even attempts to be the fulfilment of a commitment of the political party forming the government at that time or the transposition of a policy. [Translation][69]

The main conclusions that emerge from this part of his study may be summarized as follows. It appears, first, that while the unions strongly urged that the state intervene through legislation, they were also affected by these labour laws and not necessarily in the way they may have expected. Similarly, the demands of management, more often than not in reaction to those of the labour unions and generally favouring maintenance of the status quo, were variously received. In the face of these conflicting demands, the government reacted by intervening increasingly in labour-management relations, thereby reducing the margin of play left to the two parties in the area of collective agreements. It is not too surprising that labour law, under these circumstances, appears to Morin to be the product not only of power struggles between employers and employees but of government will as well.

This last conclusion, however, while it reinforces the viewpoints expressed by Beck and Belobaba, far from exhausts the debate as to whether law is an independent or a dependent variable. Quite the contrary, as Arthurs points out; it is precisely the stand taken on this issue that will often determine one's view of law as an instrument of economic and social intervention. Drawing on the field of labour law, Arthurs writes:

> For example, the assertion that the enactment of collective bargaining legislation in the 1940s promoted the rise of trade unions requires close examination. If law is seen as an independent variable, the statement implies that a decision was taken within the legislative branch of government which gave workers the right to organize; fortified by this new legal protection, they formed unions for the purpose of negotiating within the structures established by the new law. If we view law as a dependent variable, determined by the deep structure of economic relations, the same statement might carry quite a different message. Workers, we might be saying, were in fact already winning the "right" to bargain collectively by their own efforts prior to the enactment of legislation. Since law serves dominant interest — employers', not workers' — the legislation can be seen as an attempt not to improve the position of unions so much as to divert and contain their activities within limits and for purposes deemed acceptable to those who enacted the law.[70]

Is this then to say that the debate is at a dead end, and therefore of no practical interest? For advocates of a pluralist approach, of which Arthurs is one, there is no doubt that if the debate boils down to a choice between two extreme positions, the answer to this question must be in the affirmative: each of these positions, in fact, is open to criticism, and none can be absolutely demonstrated. This same debate, however, leads to concrete conclusions and assumes real significance when law is considered as both an independent and a dependent variable. Those adopting this viewpoint are forced in their description and evaluation of law to consider all the social factors that have led to its drafting, as well

as the intentions of the legislator, the content of the law, and the factors influencing its application.

A number of studies, prepared from a distinctly pluralist perspective, shed an interesting light on this view of law as the product of social reality and increase the need to refer to underlying economic power struggles. Thus, for example, Weiler points out the considerable impact on the evolution of labour law in Canada of the adoption of the *Wagner Act* in 1935 in the United States. At the same time, however, he points out the special circumstances in which this borrowing by Canada took place and the overall long-term impact of the direction taken. Unlike the *Wagner Act*, whose professed aim was to establish a certain balance of power in labour-management negotiations, and thus promote a higher standard of living for, and increase the purchasing power of, workers, the equivalent Canadian legislation was drafted in wartime, when the government already controlled wages and was primarily concerned about work stoppages. In this context and with this different philosophy, writes Weiler, "The adversarial model of collective bargaining that was designed to fulfill the needs of the American socio-economic scene became the labour relations public policy of Canada."[71] This labour relations system was subsequently to evolve into an increasingly legalist system which, he feels, virtually exhausted the capacity of labour law to achieve, by mere accumulation of isolated measures, "the productive, competitive full employment economy that we want."[72]

It is clear from the foregoing that law can sometimes evolve according to events and factors clearly outside its immediate sphere of application. The assertion that law is the product of social reality must therefore be understood in a broad sense that extends beyond an individual nation's situation. By the same token, this assertion must also take into consideration the fact that, within Canada, the political structures inherent in the federal nature of the state and the existence of a francophone community concentrated in Quebec add a multidimensional element to the law-society relationship. In their study "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985," Andrée Lajoie, Pierrette Mulazzi and Michèle Gamache, proceeding specifically from this idea that the evolution of Canadian constitutional law since World War II is a result of quite varied social factors, attempt to assess the impact of Quebec constitutional views on the orientation of the content of Canadian law and, secondarily, to establish the degree of openness to the concerns of Quebec of each of the specific means by which this law evolved: constitutional jurisprudence, constitutional amendment, and federal-provincial negotiations. In very general terms, their conclusion to the first inquiry is that, but for a few exceptions, Quebec's constitutional views "had no influence on the changes that occurred in the substance of Canadian constitutional law"[73] [translation]. But these exceptions are interesting in themselves for, as the

authors explain, they were "a result of occasions, ephemeral but effective, when the balance of power favoured certain political groups and consequently their ideas," and, they add:

> the political ideas that made their mark on constitutional developments were put forward by the governments that made greater demands in the area of provincial jurisdiction, and whose claims may have seemed like the lesser evil in relation to those of an even more radical and less legitimate opposition. [Translation][74]

While Quebec's political views have actually failed to orient the evolution of Canadian constitutional law in any significant way, it can nevertheless be argued, on the basis of their conclusions, that this constitutional law has occasionally shown itself sensitive to a certain decentralized social reality, provided it was expressed within the confines of a favourable balance of power ("*rapport de force*"). In this respect, it seems to us that the viewpoint Lajoie et al. express might possibly be confirmed in a similar study of the impact of Ontario's political views, which, one might hypothesize, have had, because of a rarely unfavourable *rapport de force*, a disproportionate impact on the evolution of Canadian constitutional law.

With respect to the extent to which each of the specific means by which constitutional law has evolved has been open to Quebec's concerns, they conclude that the few positive relationships between these political views and constitutional law occur essentially with respect to the evolution of case law. This observation, surprising to say the least, seems to coincide somewhat with the conclusions of Guy Tremblay. In his study of the Supreme Court as the arbiter of political conflicts, he states that the Court has not been indifferent to political power struggles; rather it has tried to neutralize them, seeking in this way to maintain a certain balance in the functioning of Canadian federalism.[75] But where Lajoie et al. argue that the power struggle has led to a very occasional welcoming of Quebec's political ideas, Tremblay sees a general tendency for the judges to impose their own political concepts on the Canadian reality.

But is this independence on the part of judges, which tends to lend law a certain air of neutrality and autonomy, real? According to Emond, one may have some reservations. In the conclusion to his study on environmental law, he writes:

> The present adversarial and hierarchical structure of adjudication seems to impress environmental issues with a competitive decision making stamp. Litigants do not come to court seeking cooperative solutions to environmental problems; they come seeking victory over their opponent.[76]

Thus, even conceding that judges, when they make a ruling, act independently, which for some is debatable, the fact nevertheless remains that they are part of a system that carries its own values. In this sense,

judicial intervention can certainly be regarded, like law, as both an independent and a dependent variable. In the final analysis, Emond shows a distinct preference for consultation and mediation as means of solving environmental problems, because the legal process, in this area, seems to him essentially tainted. His criticism in this regard is damning:

> It limits access to those with an obvious economic interest in the outcome of the case; it puts the onus of proof on those who ask for nothing more than a sober second look; it demands a standard of proof that requires the plaintiff to exhibit a measurable and easily quantifiable deterioration in physical health; it is primarily reactive to problems; and it seldom offers more than financial damages to the successful plaintiff — damages calculated according to an amount required to compensate only the plaintiff for direct and measurable economic loss.[77]

These last comments, insofar as they reveal certain deficiencies of law as an instrument for integrating new social values, demand deeper reflection about the reason for this situation. In his study of regulation, Macdonald focusses specifically on this problem. On a subject that reflects to some extent the viewpoint of Lawrence Tribe quoted earlier ("The atomization of society has triggered an explosion of law"),[78] Macdonald, reinterpreting somewhat the theories of Henry Maine on the evolution of law, attempts to show that "Over the past one hundred years, we have witnessed the gradual supplanting of an ethic of community and shared commitment by an ethic of individuality and claims of right."[79] Macdonald bases this claim on factors such as the transition from unitarian social structures reflecting common objectives to multiple social structures based on reciprocity and exchange; the gradual loss of influence of the family and church as means of structuring interpersonal relationships, leaving the state as the sole normative institution that is truly constraining in nature; the change in outlook as to the nature of the relationship between individuals and their work, prompting the development of a work ethic based not on input and the quality of the outcome, but on legal concepts of rights and obligations; urbanization and industrialization which, by encouraging the division of labour, have multiplied contractual relationships of every type; and finally the development of a new idea of progress which, in emphasizing the search for overall solutions, has led to increasing centralization of the economy. As a result of these fundamental changes, present-day society has become an atomized society, whose members express themselves increasingly in terms of rights and obligations and where the procedural requirements of the decision-making process affecting them proliferate.

Macdonald's diagnosis finds support in Payne's observations about family law. Noting the changes that have occurred in this field, he writes:

> The shift of family law to a stance of legal neutrality has been accompanied and perhaps fostered by a new focus on the rights and responsibilities of

> individuals. The battles for equality between the sexes and for children's rights have been reflected in laws that emphasize the individual's rights and responsibilities rather than family rights.[80]

Payne sees this development as fundamentally linked to the changes that have taken place in society: "Modern family law tends to respond to actual or perceived changes in society and in the roles and attitudes of family members."[81] But the process does not stop there. The new family law, evolving toward a law of individuals, calls for increased intervention by the state to ensure true equality among its members; hence repeated demands for extended day-care systems, equal pay for work of equal value, and the promotion of affirmative action programs that enable women to counterbalance their traditional economic vulnerability resulting from the role assigned them within the family. Paradoxically, the old family law, in becoming focussed on the individual, increasingly resembles the public law system.

Finally, the image our authors have of law as a system of norms related to social reality shows a certain consistency. Initially, that is, when law is being drafted, they perceive very clearly the interactions of power and influence that underlie the decision making. The power of private corporations and the business community in particular is clear. But this power encounters another, more diversified power, that of labour unions, consumer movements, ecological movements, and so on. This basic conflict, which contrasts a quantitative with a qualitative view of progress, is accompanied by other conflicts: conflicts between the sexes, cultural conflicts, political conflicts, and so on. There is no doubt that law evolves according to the power struggles that develop over time in society, but the state is not a purely passive witness to these conflicts, a simple cash register for the desires of one group or another. Lawmakers still, in their view, have a margin of autonomy all their own which affects the evolution of law.

But our authors' perception of the relationships between law and social reality does not stop here. Some go so far as to attempt to show the impact on the overall orientation of the legal system of certain basic changes that have taken place in society. Again, their observations in this regard largely converge. Four points in particular emerge. Firstly, under the impact of various phenomena such as urbanization, industrialization, the increased division of labour, the individualization of relationships, and the multiplication of private interests of every type, law has become the normative system par excellence, the system through which most social interactions are expressed, thus taking the place of other, more informal and spontaneous normative modes. Secondly, as a direct consequence of this phenomenon, and at the same time reflecting an unbounded confidence in the ability of the human spirit to resolve virtually every problem, the judicial interventions of the state have multiplied at an accelerated rate, to cover most of human activity.

Thirdly, as the number of variables to be considered when solving a problem increased, law began to search for more global solutions, thus clearly tending to concentrate interventions at an ever higher level. Fourthly, the accelerated rate of changes in society and in the economy led to increasingly rapid changes in law, thus creating a growing insecurity among those affected by it.

It is not too surprising that, in the face of such changes in the legal system, a movement was born favouring the delegalization, deregulation and dejudicialization of society. The proposed solution, however, in addition to the objections raised earlier, risks proving ineffective unless it takes into account the fact that the changes that have occurred in law are the result of fundamental changes in society itself. It assumes, in other words, that in bringing pressure to bear on law, it is possible to modify basic social behaviour appreciably. This inverted version of the law/social reality dynamic, as we shall see later, has certain limitations. Also, in the eyes of most of our authors, there is no question of rushing headlong into a delegalization of society. More often than not what they propose as remedies are approaches that invite more consultation and participation on the one hand, and more mediation and negotiation on the other, that is, more frequent recourse to a so-called informal form of law. What they seek is less an elimination of existing problems by entrusting their solution to more or less hidden private powers, than greater involvement on the part of society in the drafting and application of the rules that govern it. But the solution is not trouble-free, as most of them are aware. Increased politicization of law could just as well lead to a paralysis of action as to a "capture" of law by more influential groups.

It may be helpful here to examine the various solutions proposed in greater detail. Payne, without necessarily seeing a panacea in them, devotes considerable attention to conciliation, mediation and arbitration as means to replace the judicial process where separation and divorce are concerned. To varying degrees these mechanisms are seen as involving the parties concerned in a lawsuit more directly in the search for a solution, and are therefore more apt to lead to constructive resolutions of family conflicts.[82] In the same vein, Weiler discusses, in relatively detailed fashion, the experience of British Columbia in the mediation of labour disputes, and concludes:

> informal settlement fashioned by the parties themselves may involve a workable compromise between the positions originally taken when the dispute began. These settlements tend to endure not only because they are voluntarily reached rather than imposed from on high, but also because they can prevent the application of abstract legal rules which may not be sensitive to the real life dimensions of the dispute.[83]

Recalling Emond's criticism of the legal process, one is not surprised to note his interest in nonadversarial means of resolving conflicts, means

that encourage compromise and cooperation, even to seeing in mediation the most promising development for the future of environmental law.[84]

While he shares this interest in informal mechanisms for settling disputes, Belobaba, clearly less convinced of their effectiveness, at least as far as consumer law is concerned, suggests, as a means of overcoming the consumer's feeling of powerlessness and isolation, the more widespread use of class action suits. With respect to the formulation of consumer protection policies, however, he does not hesitate to recommend that consultation and participation procedures be improved upon and developed.[85] Macdonald, for his part, also acknowledges that consultation and mediation must be encouraged, as must contractual approaches in general, insofar as these formulas bring the law closer to the people and help to restore a sense of common enterprise. But because the formulas in question also entail their own limitations, the emphasis, in his view, must be placed primarily on the search for greater relevance between the ends pursued and the means of intervention implemented, while keeping in mind that the choices made are, above all, social choices.[86] This viewpoint is largely shared by Arthurs, Mullan and Salter in their respective studies.

Thus, in response to the progressive legalization of society, a phenomenon dictated to some extent by the very evolution of society itself, the research suggests the necessity of promoting a reappropriation of law by society. This might be accomplished through the development of procedures permitting the use of a greater variety in the modes of intervention, including informal ones, along with a new attitude that would recognize the close relationship that must exist at all times between goals, means and values. It remains to be seen whether this is possible.

Law as an Instrument of Social Change

In the following pages, we will attempt to clarify the extent to which law, regarded as the product of rational will, can change social reality. In other words, whereas we previously concerned ourselves with what was happening upstream from formal law, we will now focus our attention on what is occurring downstream. To make the transition, however, it seems important to take a step back and attempt to define the role of reason in the drafting of formal law. Here again, our inquiry will present the viewpoints of our various authors on the issues raised.

The Limits of Law as a Rational Undertaking

It should be explained immediately that the rationality in question is not that of the legal system as such (in the sense used when speaking, for example, of the formal rationality of law), nor that of jurists in their

analysis of legal rules (more in the sense of legal reasoning), but rather that of the lawmaker grappling with a concrete problem.[87] While it is true that when lawmakers intervene, they do so within a legal and social context that limits their choices, the fact nevertheless remains that their intervention implies the existence of some rational link between the identified problem and the proposed solution. It is this more specific form of rationality we wish to consider here.

The assertion that a given legal rule is rational in nature generally implies that its formulation is the outcome of a logical process beginning with the problem or problems to be solved and ending with the definition of the objectives to be attained and the means of attaining them. But differing and various constraints regularly hinder this theoretical progression toward the ideal solution. Politically speaking, first of all, either because a crisis demands expediency, or because the medium- and long-term solutions appear unviable, or, more generally, because the search for a comprehensive and thorough understanding of all aspects of a problem risks simply paralyzing government action, the various stages in the process described above are rarely given the systematic treatment involved in a strictly rational approach. Scientifically speaking, moreover, the formulation of law on the basis of such an extensive knowledge of the various aspects of a problem is obviously limited in that various theories often lead to divergent, if not opposite, interpretations of a given problem, and consequently to incompatible or contradictory solutions. Ideologically speaking, too, as those who decide on the solution to be adopted do so on the basis of a concept of society and economy that necessarily disregards other concepts deemed false or unacceptable, it is difficult for the ultimate result to be purely and objectively rational, although politically speaking it may be described as rational. Ideological pluralism, desirable as it may be in the analysis of reality, here encounters its own limitation, that of a virtually unattainable syncretism.

From the legal standpoint, finally, the analysis of a specific problem, the determination of the objectives to be attained, and the choice of the means of attaining them, within a decision-making process where the emphasis is on material rather than formal rationality, call both for retrospective studies of a fundamental or empirical nature (in order to determine the discrepancy between the objectives originally pursued and the results obtained, taking into account the means used) and prospective studies based on theoretic models (in order to clarify the potential impact of this or that new means of intervention). Such studies, fairly common in the social sciences in general, are still relatively uncommon with respect to law.

The first attempt to base law on a scientific knowledge of reality was made some time ago. Beginning with Bentham, who in his own way argued in favour of such an approach, scientific rationalism, in its application to law, passed through a number of phases, expressing itself

according to the times, in the terms of political philosophy, history and sociology, and more recently, with Posner and his followers, in economic terms. Recently, under the influence of sociology and economics, jurists have begun to take an interest in empirical research methods. As might be expected, it was first and foremost in the United States that the trend originated; while slower to get under way in Canada, it has nevertheless tended to take on more importance in recent years.

Already, however, serious warnings are being issued concerning this new version of scientific rationalism. It is argued that not only do empirical approaches raise difficult problems with respect to the methodologies used, access to information, and the criteria for interpreting this information, but, pushed to the extreme, they may go so far as to deny the autonomy of law, reintroducing as it were a new version of the old concept of natural law. The school of economic law, for example, in its most radical tendency, was perceived by some as leading to the result, paradoxical to say the least, that, on the pretext of rationality, it was necessary to resort to the natural laws of the free market economy alone to formulate law. Sensitive to this criticism, Hayek suggested his followers avoid the word "natural" to describe their position and, true to himself, refused to see in law "the deliberate work of some human mind" [translation].[88] Be that as it may, one cannot help noting yet again that scientific rationalism, while based on empirical methods designed to be objectively neutral, cannot entirely avoid being captured by specific theories or ideologies. This is not to say that, like the other forms of rationalism, it does not have quite a useful role to play in the formulation of law, but, ultimately, resort to a specific mode of legal intervention appears to be a value choice, and therefore a political choice.

These preliminary remarks about the limitations of rationalism with respect to law do not at all imply that public law is generally drafted outside of any rationality. In a sense, it may even be claimed that law is still ultimately the product of rational will in that, an incomplete or erroneous analysis of the facts notwithstanding, the legal means used to resolve a problem necessarily bear some relation to the objectives pursued, at least as far as those who draft and adopt them are concerned. It is also not surprising to note that for most of the authors involved in this phase of the commission's research, the pursuit of greater rationality remains a prime objective, although, generally speaking, they are the first to acknowledge that law is not, and never could be, a pure operation of reason.

Of the various factors they identify as obstacles to the search for more rational legal solutions, we will mention here two in particular, which correspond to two distinct levels of analysis. At the first level, that of decision making, several authors point out the natural tendency of governments to operate on an ad hoc basis, in response to crises, rather than on a medium- or long-term basis. This has concrete consequences

legislatively. An eloquent example is the area of labour relations. According to Morin, all the labour legislation produced in Quebec, both for the period extending from the late 19th century to the early 1940s and for the period 1940–85, has been piecemeal and lacking an overall plan and coherent thought, the various laws adopted being more often than not "isolated legislative solutions to so many given or specific problems or difficulties."[89] In the same vein, Weiler, describing the various stages in the establishment of Canada's labour relations system, writes: "Each of the incremental steps along the road to the Canadian collective bargaining system which emerged in the 1940s was in response to some sort of industrial crisis, usually a strike."[90] And summarizing elsewhere the overall approach adopted, he adds: "In many ways, our attention has been directed at tinkering with the labour law system rather than improving labour-management relations."[91]

Still on the same subject, but in relation this time to environmental protection, Emond develops his thinking in the following terms:

> The structure of the political and governmental processes also contributes to environmental degradation. The three- or four-year tenure of politicians and governments focusses attention on the short term. For politicians, the important run is the short run. They discount the future of the environment, relegating it to a manageable and comprehensible present consisting of one or two years. The consequences of such a short-term focus are twofold. First, it discourages medium- or long-term planning. The assumption is that tomorrow will look after itself. Few politicians are prepared to act today for environmental posterity if the benefits outlast their own tenure, and almost none are ready to act if the benefits will only be enjoyed by future generations. The second consequence is that political decisions are heavily influenced by crises. While living with the threat of the Bomb may have made society more crisis-immune, politicians are nevertheless plagued by one environmental crisis after another. First DDT, then mercury, then lead, and now toxic rain depositions are some of the more popular crises. In each case, adverse effects were popularized, the public was shocked and politicians reacted, often to the detriment of other more pervasive and serious environmental problems.[92]

Belobaba, while very sceptical of the possibilities of a strictly rational approach to law, nevertheless also notes, critically, the propensity of lawmakers to act in an ad hoc and hasty manner in the area of consumer protection:

> The history of Canadian consumer protection legislation is largely a history of ad hoc legislative reaction. Sometimes the "need" for legislative intervention is prompted by media publicity, other times by anecdotal evidence. Sometimes the law-makers respond in good faith to actual problems of consumer health or safety: for example, the injuries caused by exploding soft-drink bottles in 1978, or the health and home losses associated with urea-formaldehyde foam insulation. Other times, the legislative interven-

tion is less principled, even hysterical: for example, the enactment by Parliament in 1978 of legislation to regulate the practice of income tax rebate discounting, legislation that was given three readings and parliamentary approval in less than 23 minutes.[93]

Finally, in a more general vein, and from a Marxist perspective, Bureau, Lippel and Lamarche describe the evolution of Canadian social law as intimately related to the resolving of social conflicts that have become intolerable for the principal victims and compromise the preservation of the system that spawned them, which is another way of saying that this law evolved in response to crises.[94] At the same time, they point out one interesting aspect of this evolution which, initially piecemeal, in time turned toward increasingly global and centralized approaches.

Having said this, it is important to explain that the authors in question are generally highly aware of the fact that "any evolution of law is the fruit of a lively attempt to eliminate a maladjustment, real or presumed, between new needs and the rules in force" [translation];[95] it also is not unusual in their eyes for law to evolve in response to crises. What they are critical of, however, is too great a propensity on the part of governments to wait for a crisis situation to develop, and particularly their tendency in such circumstances to seek obvious short-term solutions rather than far-reaching medium- or long-term solutions. The result, points out Morin, is not only that laws are continuously being amended, but that from the time they come into being they are seen as "temporary measures or measures likely to be corrected in future sessions" [translation].[96] We shall see later how such an attitude can be explained by the symbolism associated with law, the mere fact of intervening sometimes assuming greater significance than the substance of the intervention.

If the difficulties raised by the search for greater rationality in formulating law ended here, the problem would not be insurmountable. For a number of authors, however, the real obstacle lies elsewhere, at a more fundamental level. As they suggest, insofar as it is virtually inconceivable that human reason will ever come to know and control all the factors that influence the solution of the least complex social problem, and insofar as for a given problem there is, more often than not, not just one, but several possible rationalities, one must realize that an objectively and strictly rational approach is impossible. Not only is it impossible, they explain, but the very claim that it is possible to resolve most social problems on an essentially rational and scientific basis appears to be in itself dangerous, in that it often conceals a particular ideology.

The most explicit in this regard is Belobaba. In a long argument in which he analyzes the fundamental problems that hinder the formulation of effective policies and rules in the area of consumer protection, he successively denounces the growing tendencies to resort to unidimensional theories to resolve all problems, to believe that any problem must necessarily have one rational solution, and, finally, to see in empirical

research the means of finding objective solutions. It is impossible here to present his thinking on each of these points in detail; the following passage, however, effectively illustrates his views:

> We do not suggest for a moment that we abandon our unique capacity as humans to reason our way through problems to "rational" solutions. We suggest only a need to review the extent to which our reliance on, indeed reification of, the power of human reason dominates in modern policy scholarship and influences unduly the design of both research agendas and regulatory vocabularies. If our continuing commitment to "rationality" is nothing more than a rhetorical reaction against the abuses of arbitrary decision making, then it is understandable and benign. However, if this belief in human reason is more substantively connected to notions of scientific method, objectivity and "final solutions," then the situation is more sinister, indeed quite serious. If the latter, the tendency toward single-answer theorizing will continue to grow. Exclusionary analytical vocabularies will be employed, experts will dominate the policy-making process, and we will remain where we have been for the past 17 years — in the rut of wrong assumptions and wrong directions.[97]

Without attacking head on the question of the place of rationality in formulating law, Arthurs basically agrees with the pluralist conclusions of Belobaba. In fact, his study may generally be considered as a vigorous argument in favour of a more diversified approach to law, an approach in which different perspectives, theories and methods of investigation are used and challenged with a view to clarifying the crucial relationship between legal form, the function it is expected to perform, and the economic, political and social context in which it operates. In his view this is the only way of achieving rationality in formulating law.[98]

This understanding of rationality also coincides, to a large extent, with Macdonald's remarks about the formal regulation of the state. According to Macdonald, the debate currently underway as to the need to control and even restrict the regulatory activity of the state is essentially misdirected in that, on the one hand, it is based on a limited view of regulatory activity in general, and, on the other, it focusses on the superficial causes of the increase in formal regulation, the real explanations being more ideological in nature. In his view, therefore, the basic problem lies not in determining whether there is too much or too little regulation or whether regulation should be more controlled but rather in developing approaches that promote closer connections between the various possible means of intervention, the ends pursued, and the foreseeable social repercussions.[99]

Emond approaches the problem of rationality in formulating law rather differently. The real problem, as he sees it, lies in the fact that, at the economic, political and judicial levels, fairly fixed rationalities dominate the formulation process and impede the necessary adaptation to new realities. For example, with respect to economic rationality, he

writes:

> There is, however, another view that current economic theory has chosen to ignore. This is one in which rational behaviour is not predicated on the ruthless desire to appease immediate self-interests, but is rather one in which cooperation and mutual aid are the distinguishing features of rationality.[100]

Similarly, he denounces what appears to him to be an essential feature of political rationality, namely, an indestructible belief in growth as the answer to most problems, a belief all the more firmly rooted as it implies a promise for the losers in the economic system that there are better days to come. From this standpoint, it seems evident that there is scarcely room for a different reasoning, whereby, for example, there would be no relation between the standard of living and the quantity of the goods produced. This prevalent political rationality is also supported by another rationality, a bureaucratic rationality, which tends to reduce any complex problem to a dimension manageable by the administrative apparatus as it exists, at the same time defining it in terms already familiar to the members of this apparatus, such that major changes in direction are often difficult, if not impossible. Finally, with respect to law, Emond challenges a rationality essentially oriented toward the settlement of disputes:

> First, it assumes conflict within society and the need to settle such conflict, primarily through a pronouncement of "rights" as applied to the particular factual setting that gave rise to the conflict. Secondly, the process is designed to focus on the particular claims of the individual contestants. Adjudication heightens the sense of the particular. But in doing so, it trivializes broader, community-wide concerns that are of no more than general interest to the two parties. Thirdly, it is based on a win-lose premise. There is little within the process that encourages a negotiated resolution of differences, other than the prospect of defeat. Nor is there anything within the process that facilitates compromise. Indeed, the limited range of remedies available to the decision maker reinforces the win-lose mentality of the participants.[101]

The real problem, according to Emond, is not therefore so much the absence of rationality in the decision-making mechanisms as the disproportionate weight of certain rationalities. Pessimistic about the possibility of a major reversal in this state of affairs, ultimately seeing the problem as a conflict of values, he finally leaves it to the political process to introduce into law, "incrementally," the changes necessary to face the imminent crisis brought on by the deterioration of the environment. In this sense, he largely agrees with the conclusions of Belobaba, Arthurs and Macdonald.

The views of the various authors on the relationship between law and rationality do not end there. Often the subject is dealt with incidentally,

as when Morin questions the capacity of governments to find rational solutions in the area of labour relations, as they attempt successively to appease management and labour.[102] Furthermore, it should not be thought that an absolute consensus prevails. Thus, with regard to the contribution of technical and scientific analyses to the formulation of law, Makuch has a distinctly more pessimistic outlook than does Emond.[103] But on the whole, it can certainly be said that there is a fairly broad convergence of viewpoints, at least on the essentials.

Basically it is argued that the search for greater rationality in formulating law must first proceed through more openness toward the various political ideologies and scientific theories, a greater reliance on fundamental and empirical studies, and, finally, an accelerated development of interdisciplinarity in order to arrive at a true contextualizing of law. But such an approach, which might be described as pluralist, is not enough. Because syncretism is virtually unattainable, it must be recognized that a policy decision must be somewhat drastic in its choice of means and ends. In this regard, a second point emerges. For most of our authors, in order for such a decision to be rational, that is, effective, it must take into consideration, simultaneously, the variety of possible means of intervention, each with its own specific characteristics; the nature of the objectives pursued; and, above all, the social significance of the choices made, namely, their implication with respect to values and their capacity for mobilization. It is on this one condition that the contradictions and confusion that so often seem to obstruct our law can be, not eliminated, but reduced.

For we must not delude ourselves. The contradictions and confusion are not about to disappear, as Belobaba points out, because they are the inevitable consequence of the limits of human reason. But at the same time there is no doubt that an approach to law that is more systematic and global, and more sensitive as well to the underlying value conflicts, may contribute to the development of more rational solutions and avoid certain contradictions that are unacceptable in the medium or long term.

Mossman provides on interesting example of such contradictions in her study of family law and social security law:

> To the extent that family law principles have increasingly recognized the equality of family members and the independence of spouses on divorce or marriage breakdown, they seem to be at odds with some of the principles of social welfare which focus on the family unit to determine individual's entitlement.[104]

Taking the example of wives to illustrate her observation, because they are generally in a less advantageous situation in the event of marriage breakdown, she writes:

> The law's continued emphasis on spousal support for former wives, rather than a recognition of the need for social welfare assistance, places many

> former wives (particularly those with few assets and little income) in an impossible predicament on divorce or marriage breakdown. A wife is usually required to seek spousal support as a condition of qualifying for welfare assistance, and the granting of an order for spousal support may prevent her from receiving regular welfare assistance, even though her support payments may be intermittent or for less than the full amount.[105]

This problem illustrates very concretely the difficulties that may sometimes arise in reconciling in law more or less conflicting values such as, in the case at hand, dependency and interdependence. Unless these difficulties are clarified, they can only make the application of law, at both the judicial and administrative levels, more problematic. This leads us to take a closer look at what is appropriately referred to as law in action.

Law in Action

To question law in action, as opposed to formal law, is first and foremost to question the involvement of courts and administration in the application of law. But it is also more than that, for in order to have an accurate view of law in action, one must also take into account the actual behaviour of those for whom the law is destined. Since the American realists, it has been accepted that there is a certain discrepancy between law in action and formal or written law. Without necessarily adopting the viewpoints of the realists, it seems important at this stage to question the extent of this phenomenon, for it directly challenges the ability of formal law to influence social reality. Thus, Arthurs maintains:

> we must not assume that even formal and authoritative statements of law are universally understood and uniformly applied by judges, administrators, policemen, lawyers, companies, etc. Each of these actors may enjoy some overt or covert discretion with which to divert, reinterpret, or even effectively repeal formal legal rules. Each may do so in partial response to the responsibilities and objectives associated with the particular role or function being discharged.[106]

The Courts and the Settling of Conflicts

We saw earlier how the role of the courts was central in the theoretical discussions about law. The fundamental issues raised in these discussions had to do primarily with the margin of discretion judges enjoy in exercising their function, the legislative or nonlegislative nature of their interventions, and, more generally, the dynamics between legislative and judicial power. Various positions have been adopted in this regard, ranging from a claim for the courts of a very extensive autonomy (American realist school), to a moderate autonomy confined by law (Kelsenian school), and even to a near absence of autonomy (Dworkin). This last position, insofar as it implies that the judge cannot deviate significantly from the law in force, calls for a few words of explanation.

For Dworkin, the law to which the judge must in all instances refer includes not only formal rules, but also the general principles and standards established by the moral code of the community.[107] This viewpoint, based, among other things, on the actual behaviour of judges, may also be seen to explain the discrepancy between written law and the law applied by judges. In this sense, it paradoxically confirms the existence of such a discrepancy.

Be that as it may, it is not our intention here to delve into the various theories developed on the issue. Our aim, in broaching the subject, is more concrete. We will attempt to determine, on the basis of studies carried out in this phase of the Commission's research, what kind of influence the courts exert over the application of law, and consequently in what circumstances resort to the courts seems most appropriate, given the social objectives pursued and the variety of instruments available, ranging from the most formal and restrictive (the ordinary courts) to the least formal and restrictive (administrative tribunals, arbitration, mediation).

Broadly speaking, one often describes the influence of the courts as either conservative or liberal. The use of such terms may be hazardous. Not only are they vague; they tend to attribute prime importance to factors such as the backgrounds of judges, their personal values, and their view of their role in the light of public expectations, court traditions, and the ideas prevalent in the legal profession in general.[108] In other words, such terms, in emphasizing the autonomy of the courts, risk making us forget that the courts operate on the basis of a law which may in itself be described as conservative, liberal, and so on, and thus obscure the relationship between the judge and the law. In the following pages we will nevertheless resort to these terms, aware of the risks involved, because they correspond to some extent to the language used by the authors in this section and because they reflect the relationship of law to economy and politics.

Generally, Canada's judicial system is perceived as exerting a conservative influence on law, although a major distinction must be made here between ordinary courts and administrative tribunals, a distinction to which we will return later. The most categorical opinion about the influence of the courts is probably that of Morin. Referring to the reaction of the courts to new postwar labour legislation, he writes:

> The courts generally became the guardians of the legal system of that time, arguing that these new rules should be treated as extraordinary measures, which allowed for a restrictive interpretation. Since then, there has been a dialectic between the "legislative" and the "judicial" with respect to labour. A great many amendments to labour laws are nothing more than positive or negative responses to judicial decisions. This phenomenon is not specific to Quebec, nor even to Canada: the history of labour legislation in England, Germany, France and the United States falls within this same niche, though

the respective solutions adopted differ. Be that as it may, the judicial counterweight to the action and reactions of the lawmaker cannot be underestimated in assessing the orientation and structure of labour legislation. This is an important element, for the courts generally serve to check the evolution of labour law and their action largely extends beyond mere concern for the consistency of law *in toto*. [Translation][109]

Unfortunately, Morin remains relatively silent as to the reason for such an attitude on the part of the courts. By way of explanation, he cites a passage from the case of *Harrison v. Carswell*, in which the Supreme Court, called on to decide between property rights and the right to picket, opted in favour of property rights, a choice he interprets as reflecting the prevailing view in the judges' native environment. The passage in question is worth citing, for it provides a remarkable illustration of Dworkin's comments on the judicial function:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function?[110]

Monahan, in his study of the influence of the Supreme Court in economic matters, carries the analysis of the relationship between judicial power and law much further. Taking first as an example the case of competition, he establishes at the outset what he describes as the conventional analysis of the Court's contribution in this regard:

The core assumption of this conventional analysis is that the *Combines Investigation Act* embodies a determinate and identifiable policy prescription regarding competition in the economy. The judiciary has failed to apply this policy choice in its decisions either because of a simple lack of understanding or else because the judiciary wanted to substitute its own values for those of the legislature. The common conclusion is that the [Supreme] Court should begin applying the purposes and policies contained in the act itself, instead of grafting onto the statute some alien values of its own choosing.[111]

But in contrast to this viewpoint, Monahan proposes another explanation of the Court's performance:

The starting point of this alternative view is the claim that the *Combines Investigation Act* is essentially indeterminate. In its present form, the act fails to articulate any meaningful core set of values on the question of competition. This indeterminancy is not simply the result of poor drafting

technique or the inclusion of such vague terms as "undue" or "public detriment" in the statute. It flows from an essential controversy over the meaning of "competition" and an ambivalence over its proper function in a market economy.[112]

Confronted with such a situation, continues Monahan, the courts, and more specifically the Supreme Court, have attempted to develop a principle whereby they are able to distinguish "the abuse of market power from its legitimate exercise."[113] But the various attempts in this regard have been unfruitful, the proposed criteria always ultimately proving to be nonfunctional and lacking in relevance. Not satisfied with this, Monahan subsequently attempts to explain the apparent inability of the courts to find a functional solution. Regarding as too simple or too partial the explanation that the courts have acted essentially according to the interests of the business community, and as too limited the explanation that the courts have been too constrained by the penal nature of law, he advances an explanation related at once to the Supreme Court's method of reasoning and its implicit notion of the relationship between the state, law and society. This hypothesis, which is confirmed in a subsequent analysis of the Court's jurisprudence on federal power as it relates to trade and commerce, he states as follows:

The Supreme Court has consistently refused to structure doctrine on the basis of a utilitarian calculus of general welfare. Instead, it has attempted to organize the legal universe into distinct, mutually exclusive conceptual categories. The categories constitute zones of absolute entitlement possessed by individuals or institutions. These categories operate in an all-or-nothing manner. Fall within a protected sphere of interest, and an action is protected absolutely; fall outside such a sphere, and an action is void. The jurist is supposedly relieved of the necessity of balancing competing values or divining the public interest. All that is required is a decision as to which zone of entitlement is implicated in a particular case. In this way the overarching tension between the values of freedom and security might be transcended.[114]

But this explanation alone is not sufficient in his view insofar as it does not inform us as to the reasons that may have led the Court to favour this form of reasoning when other options were open to it. The Court's true point of departure, suggests Monahan, lies in a conception of society in which the state and law intervene to restrict the natural freedom of individuals and orient their actions in certain given directions. Necessary as it may be, this intervention must be regarded as a deviation from the natural order of things and be given restrictive interpretation by the courts.

This interpretation of the jurisprudence of the Supreme Court with respect to economics agrees essentially with the conclusions of Morin. It is interesting that Monahan ends his study by acknowledging that Dworkin's description of the way in which judges proceed, whether or

not one agrees with his theories, is fairly consistent with his own observations regarding the functioning of the Supreme Court:

> The claim is simply that the case studies presented in this paper lend some support to Dworkin's descriptive arguments about judging. Specifically, the doctrine in the combines and trade and commerce areas supports a belief that judges avoid relying on utilitarian assessments of general welfare in deciding cases. This should not be taken to mean that the judicial choices in these areas have been neutral or apolitical, or even that the cases can be analyzed in terms of a "rights" framework. The point is simply that certain sorts of political arguments have been consistently eschewed by the Court, regardless of the particular doctrinal context.[115]

A number of other authors, such as Beck, Mossman and Weiler, also refer in passing to the restrictive influence of the courts. Beck, for example, in questioning the social responsibility of corporations, writes: "It is the courts rather than corporate statutes that take profit maximization to be the sole, legitimate purpose of corporate activity."[116] Mossman speaks of the reluctance on the part of judges to recognize the independence of spouses in social security matters, particularly when it is the wife who is the plaintiff.[117] And Weiler generally agrees with Morin's conclusions as to the contribution of the ordinary courts in the area of labour relations: their action, he suggests, was perceived as conservative and restrictive because they attempted to apply fundamental common law concepts, focussed on individual freedom, to rights and obligations partially decreed in reaction against common law.[118]

But the generally conservative influence of the courts thus far shown does not exclude occasional openings in new directions, more liberal approaches, even a certain amount of legal activism. Soon enough, however, a reversal begins, as though the courts suddenly feel themselves to be in the uncomfortable position of usurping power that is not theirs. As a result, over a long period, this to-and-fro movement may be seen to some extent as a stabilizing influence, as a continuous return "to moderate ideologies, to middle positions, to the balancing of interests and power relationships" [translation].[119]

In his study of the Supreme Court as the arbiter of political conflicts, Tremblay draws just such a portrait of the Court's activity. "In fact, the Supreme Court," he concludes, "seems to have seen itself primarily as an instrument of neutrality and stability within a system of social management that generates conflict" [translation].[120] Furthermore, there is no doubt in his eyes but that the Supreme Court has been relatively successful in this venture. Not only has it conveyed a concept of the Canadian political entity which on the whole corresponds to the expectations of governments and the people, but it has done so in what are at times difficult conditions, and in such a way that the advocates of sometimes radically opposed positions always held onto the hope of seeing their views taken into consideration, if not triumph. The Supreme

Court has managed this tour de force by combining a fairly strong conservatism toward principles with a certain flexibility, even innovation, toward their application. It is also not surprising that, when the Court exhibits activism, it generally spends little time establishing the concrete limits of its action, even at times distinctly regressing. Tremblay provides a number of examples of this, particularly in the jurisprudence pertaining to the *Canadian Bill of Rights*, but also in the more recent example of the constitutionality of the patriation bill. With respect to power-sharing, this attitude is evidenced in bouts of centralization and decentralization, as though it were attempting to maintain "credibility as an arbiter between the central power, from which it derives its existence, and the provinces" [translation].[121] Finally, his overall judgment of the Court's performance is still decidedly positive:

> In summary, it seems to me that since 1945 the Supreme Court has made a considerable contribution to the resolution of political tensions that had the potential to become more pronounced. By remaining within legal continuity, it allayed the fears expressed when appeals to London were abolished and it referred the task of reforming the basic characteristics of our method of government to the politicians and electorate. By a delicate rearrangement of the relationships between exclusiveness and concurrence of federal and provincial powers within a system of relative equilibrium, it relaxed the rules of the political game then in existence. By encouraging intergovernmental cooperation, it further increased the possibilities of adaptation within the status quo, which it seemed determined to maintain. If Canada is today still subject to forces that endanger its future, it is not the Supreme Court that inspired them nor is it the Court that impeded their control. Nor do I believe that the Court should have acted otherwise. [Translation][122]

However, this optimism on the part of Tremblay is not shared by all. For Lajoie et al., for example, the Court is not truly neutral politically, but subject to the influence of the tensions and power struggles that emerge in society.[123] For Monahan, the constant search for a certain balance to which Tremblay alludes is far more a random one than a structured approach of Canadian federalism. In this search, he adds, the Court merely reflects the lack of a true consensus in society as to the nature and direction of this federalism.[124] This fundamental ambivalence of the Court, while it may appear over a long period to be a form of stability, entails considerable disadvantages in the short term. In making it difficult to predict what the Court will rule, it also impedes planning. Not only is this so with regard to power-sharing, but the same phenomenon is also evident each time the Court is confronted by fundamental conflicts of values. Makuch, for example, notes the paradoxical attitude of the courts, and particularly of the Supreme Court, which, after opening the door to a more flexible and discretionary use of the planning power by municipalities, then considerably restricted this power in order to pre-

vent any discrimination.[125] From there it is just one step further to Monahan's conclusion that the courts are not the best mechanism for settling disputes whose solution involves primarily a choice of social values.[126]

The fact is that the generally conservative and restrictive influence of the ordinary courts leads a number of authors to recommend greater reliance on other means of settling disputes and, insofar as ordinary courts are competent to make law, on other means of intervention that are more democratic and more open to change. This view is so widespread that one might easily conclude that most of the authors in question share a single interventionist philosophy of the state. Such is far from being the case. For example, when Weiler suggests greater reliance on mediation and even arbitration rather than on the courts, it is certainly not because he hopes to help bring about increased state intervention in the area of labour relations. Rather the experience of other countries, such as Australia and Japan, brings him to a radically opposite conclusion:

> The important feature of these examples of successful consultative structures is that the governments of those countries have relied less on legal intervention and more on leadership and consultation to influence behaviour in the industrial relations community.[127]

In actual fact, what emerges primarily from the various studies is that judicial intervention must not be regarded merely as a means of ensuring compliance with the law, which implies a largely passive attitude on the part of the judge, but rather as a given normative mode, with its own characteristics, more or less appropriate depending on the case, existing in parallel with other normative modes. Hence the importance, from a perspective in which law is assigned the role of acting on social reality, not only of understanding clearly the characteristics specific to the judicial mode of intervention, but also of properly situating this particular mode in relation to other modes.

From this standpoint, a number of conclusions become clear. Firstly, and generally, it seems that resort to ordinary courts, as opposed to administrative tribunals, is particularly appropriate in all instances where a problem may be analyzed in terms of relatively well-defined legal categories, because of the method of reasoning favoured by judges. Conversely, when the problems raised challenge the fundamental choices of society and law offers no specific criterion on which to base these choices, the courts are limited, in arriving at a solution, either to calculating social utility, an essentially political operation in which they generally refuse to engage, or to proceeding on the basis of legal categories more or less relevant to such choices, in which case the solutions will always appear in some way unsatisfactory, if not ineffective. The viewpoint of Monahan is obvious here.

Before reaching a conclusion as to the soundness of this viewpoint, however, it is important to consider Dworkin's argument to the effect that, in difficult cases where formal law does not provide specific decision-making criteria on which to base a solution, a decision in law based on principles and not on a calculation of social utility still remains possible by basing the decision on the moral code of the community, that is, on a global view of the various rights that society respects: the right to freedom, the right to equality, the right to dignity, and so on.[128] Our aim here is not to discuss the validity of this argument, but rather to determine whether it contradicts Monahan's position that the judicial process is not suitable for resolving certain types of conflicts.

It is not easy to give a simple answer to this question, for Dworkin himself admits that it is not up to judges to calculate social utility. But in his view, this does not imply that judges must abstain from ruling in certain cases. What it does mean, rather, is that when called on to rule in difficult cases, they must do so on the basis of principles of law rather than on the basis of a calculation of social utility, as, moreover, they do most of the time. Even when they use language of a political nature, adds Dworkin, their remarks may just as easily be interpreted as a statement of principle pertaining to the rights of the parties. Consequently, working within this logic, it obviously becomes difficult to find Monahan right when he states that the judicial process is not suitable for resolving certain types of conflicts.

But the real problem raised by Monahan is not that of the validity of judicial intervention, but rather that of its effectiveness. The least that can be said of this view is that other studies, in particular those of Emond and Weiler, tend to show him to be right. The field of environmental protection, examined in Emond's study, provides an interesting example of the type of problem referred to earlier involving a fundamental conflict of values in a context in which the orientation of law is still largely undetermined:

> The conflict between development and environmental protection may be addressed in one of two ways. A clash of rights may be resolved solely on the basis of the claims of the parties; alternatively, the problem may be examined and resolved in a way that serves the broader community interests. Legal rules appropriate for resolving the first set of problems tend to be non-instrumental in the sense that they do not serve goals or ends external to the legal rules themselves. In other words, the legal rules may express an assumed principle of justice that is accepted without explicit reference to the achievement of an external goal. Examples of such rules might include a right to a minimal level of environmental quality, the right to injunctive relief from any interference with one's property (environment) irrespective of costs, or a rule of reciprocity. Legal rules appropriate to the second mode of resolving disputes serve some broader community goal such as economic efficiency, community welfare maximization or income redistribution.[129]

As an example of this second type of rules, Emond refers to certain common law doctrines (nuisance, riparian rights) which focus on the reasonableness or unreasonableness of the dealings involved. However, he immediately adds:

> Although the "reasonableness principle" offers the seemingly irresistible promise of efficiency and wealth maximization, the approach is fundamentally flawed, providing little more than an intuitively persuasive rationale to pursue highly risky and environmentally dangerous activities. First, although it purports to assess net community benefits and costs, the assessment is slanted heavily in favour of the defendant. If the plaintiff complains of "personal sensible discomfort" — the typical environmental complaint — the court weighs the "surrounding circumstances" in determining whether the relief sought is appropriate. In this way, for example, a defendant's early arrival in an industrial neighbourhood argues strongly in favour of the reasonableness and hence acceptability of a very dirty and environmentally damaging activity. Also relevant for purposes of determining an appropriate remedy are such factors as the severity of the harm to the plaintiff, the defendant's capacity to create jobs, the relative economic position of the defendant in the community, and the relative position of this defendant's activity vis-à-vis other similarly situated defendants. . . .
>
> In other words, the wealth maximization calculus performed by the courts is limited by the present political and social value system to a particular set of concerns that bias the calculations in favour of the defendant's interests in growth and development.[130]

According to Emond, therefore, there is no doubt that certain types of problems are poorly served by a judicial approach.

Weiler reaches almost the same conclusions with respect to labour relations. Not only, he writes, have the courts always exhibited a certain difficulty in adapting to the emergence of new laws in this field, but they also have shown they were fairly ill-equipped, because of the very nature of their functioning, to tackle the root causes of labour disputes. In relying, among other things, on the interplay of unilateral requests for injunctions, they have found themselves in a situation in which the very credibility of justice was placed in doubt. Pursuing this line of reasoning, Weiler adds:

> Attacking the underlying sources of conflict and the hidden agendas involving human emotions is not required in a typical court case involving combatants who usually have no further relations. The purpose of a court proceeding is to produce a winner and a loser, but the special character of industrial conflict is that it takes place within the context of an ongoing relationship. . . .
>
> In view of this continuing relationship, it is desirable to resolve disputes in such a way as to enhance this ongoing relationship. Adjudicated verdicts from some remote legal tribunal may result in loss of face by the losing party. In contrast, an informal settlement fashioned by the parties themselves may involve a workable compromise between the positions originally taken when the dispute began.[131]

These last remarks, while confirming Monahan's viewpoint respecting the inefficiency of the judicial process in certain situations, bring us to a discussion of the possible corrective measures. Three hypotheses are considered here. The first, proposed by Monahan himself, would be to structure the rules of law in such a way that the courts have no recourse to more or less artificial arguments to make essentially political choices; this could be done by specifying clearly the criteria on which they must base their decisions. Thus, suggests Monahan, in the area of competition, an automatic prohibition on price fixing would greatly facilitate the work of the courts.[132] The difficulty, obviously, is that in order to achieve such a solution, a political consensus as to the general direction to be followed is first necessary, and this is still not easy to achieve in areas where the value conflicts are particularly pronounced.

Failing this, the second hypothesis would be to refer the decision to tribunals better equipped to make an analysis in terms of social costs and benefits and more open to political decisions, in other words, to administrative tribunals. Even accepting that a strict calculation of economic efficiency must prevail in the taking of such decisions, an argument which is debated, the resort to a specialized tribunal capable of making such a calculation seems even more justified. It should be noted that this solution is favoured by a number of authors, since the problems concerned involve a certain degree of uncertainty with respect to the objectives pursued, a certain technical complexity with respect to the analysis to be made, and a political choice with respect to the decision to be handed down.

Mullan, in his study of administrative tribunals, describes the advantages of this form of intervention. Besides the fact that they allow for a distribution of power in a government system where power is already too concentrated:

> Such a structure for decision making is desirable because of a variety of factors. The most notable of these are well known: inadequate adjudicative performance by the courts, in terms of substantive, procedural or remedial considerations; a specialized area where expertise is important; a situation where the removal of party political considerations may be appropriate; the desirability of combining legislative, executive and adjudicative functions in one body.[133]

However, this particular mode of intervention, advantageous as it may be in certain circumstances, is nonetheless itself the object of criticism. The most frequent and harsh criticism is that administrative tribunals are basically undemocratic insofar as they enable persons with no political accountability to take decisions of a political nature. This criticism spawns a number of suggestions aimed, among other things, at allowing for broader referral to cabinet, authorizing cabinet to issue directives more frequently with regard to administrative tribunals, or even limiting such tribunals to a purely adjudicative role, while further ensuring their

independence. In Mullan's view, however, this criticism is clearly misdirected.

If we stick to reality, he argues, we must recognize that administrative tribunals, owing to their extensive use of public consultation procedures, are at least as democratic as other traditional modes of intervention. In this regard, he writes: "In particular, many of our administrative tribunals are already as publicly accountable, if not more so, than the parliamentary, executive or judicial branches of government."[134] One might readily object here that Mullan is confusing two distinct notions, that of democracy and that of accountability. But he takes care to explain that his viewpoint on the matter is not just a political theory that more or less corresponds to reality, but rather one dictated by reality itself. He adds:

> Of course, this does not mean that administrative tribunals should be left alone, or that notions of accountability to the Parliament and executive are outmoded and unnecessary. Rather, it is a plea to regard all such devices as among a number of instruments of accountability alternatives from a systemic standpoint and not from any blinkered view of our constitutional history.[135]

Another objection to administrative tribunals is that they tend in time to adopt a method of functioning that increasingly resembles that of ordinary courts, owing to the control the latter have over them. This tendency, pointed out by Mullan and Weiler, naturally risks rendering the expected advantages of administrative tribunals illusory. At the same time, stresses Mullan, it must be acknowledged that the judicial control of administrative tribunals has proved justified in a good many cases, particularly when the decision involved was directed at a particular individual. Furthermore, the severe criticism generated by the exercise of judicial control in the area of labour relations seems to have resulted in a more cautious and less interventionist attitude, such that there is reason to hope that a certain balance will in time be struck.

Be that as it may, the fact remains that administrative tribunals, like ordinary courts, do not provide a satisfactory response to all types of problems. In those instances in particular where the search for an effective solution to a problem forces one to move outside the narrow framework of law and closer to the real-life experience of the parties, more informal, more flexible, and even less adversarial methods of settlement, such as arbitration, conciliation and mediation, may offer a real advantage. Several authors, including Payne, Weiler, Emond and Arthurs, recommend greater reliance on such means of resolving conflicts, when warranted by the circumstances. Here again one must note, particularly in the case of arbitration, a certain tendency toward judicialization. Weiler effectively explains how this process comes about in the area of labour relations:

> Collective agreements have become more complex and comprehensive; the labour-management relationship has increasingly become the object of public law regulation. Consequently the parties now seek arbitrators who have broad experience and expertise in a variety of legal regimes. Thus, the favoured arbitrators are lawyers with skills which are in great demand and who may correspondingly command big fees. For decades, arbitration awards have been recorded in specialized report series, have spawned major texts on the law of the collective agreement and have attracted frequent media attention. With so much riding on the outcome of a case, one side feels the need for outside assistance and hires a lawyer. Not to be outgunned, the other party follows suit. The result of these trends is that grievance arbitration has become a highly professionalized and specialized form of litigation.[136]

As Payne mentions, moreover, the fundamental criticism most often raised with respect to the arbitration process is that it offers no guarantee of "due process of law." But paradoxically, as the increasing judicialization of arbitration tends to correct this situation, its advantages tend to fade. In the words of Justice Rosalie Silberman Abella, whom Payne quotes, arbitration is nothing else then but "the adversary process without the judicial atmosphere, and therefore not . . . a real alternative to it."[137]

This probably explains why, for a number of years, more and more attention has been paid to processes that involve greater participation, and even cooperation, by the parties concerned. In areas such as labour relations, environmental protection, and family law, mediation in particular seems to offer interesting prospects. Once again, Weiler clearly points out the advantages of these less formal methods of settling disputes:

> The touchstone of these alternative methods of dispute resolution is that they involve the direct participation of the people who must live with the outcome. In the formal adjudication process, whether in court or in conventional arbitration, the parties often feel alienated because of abstract legal rules or the procedures involved, or because lawyers decide and conduct the cases. With these informal techniques the parties control the process, the hearing often takes place right at the premises, and the outcome is known almost immediately. All these factors contribute to the recognition that, if the parties are involved and committed to the process, it will work for their mutual benefit. This is responsible industrial citizenship in action.
>
> Moreover, the process is conducted at a small fraction of the cost and time that is now the norm in conventional grievance arbitration.[138]

Furthermore, with respect to family law, Payne goes even further, stating that the gradual introduction of these new mechanisms "openly [acknowledges] what has long been known — that legal processes are insufficient, of themselves, to provide the constructive resolution of family disputes."[139]

This last comment brings us directly back to our initial question as to

the ability of law to influence social reality. What emerges, above all, from the comments of the various authors about the settlement of conflicts is that the choice of a particular means of adjudication is closely related both to the objectives pursued by the law and to the implicit values one attempts to promote.

In this sense, their plea is first and foremost for greater diversity in the choice of means of intervention, and ultimately for greater rationality in the decision-making processes leading to these choices.

The Administration and Application of Law

Continuing our inquiry as to the ability of law to influence social reality, we must now turn our attention to another dimension of law in action, that of the application of law by government. The problem raised here is effectively stated in the following extract from Arthurs' study:

> This analysis has proceeded on the assumption that regulatory intervention is meant to control behaviour in the marketplace or in some other context. However, government's capacity to encourage or undermine programs of social support and assistance is also easily demonstrated. For example, a welfare or human rights program designed to enhance the well-being of disadvantaged individuals may be denied an adequate benefit budget, or alienate its intended beneficiaries by the insensitive behaviour of poorly selected or ill-trained officials. Once again, administrative structures, however well designed, cannot do what government does not really want done.[140]

This problem, adds Arthurs, is encountered when the government, torn between the need to act in order to satisfy certain interest groups and the fear of thereby alienating the support of other interest groups, adopts a bill but subsequently fails to establish the administrative support necessary to attain its objectives. Some will see such an explanation as open to criticism insofar as it seems to suggest an essentially Machiavellian view of government. In fact, all that Arthurs means to show is that, in a political context, divergence between written law and law in action may be a desired objective. More generally, Arthurs' comments also enable us to understand that, when the government pursues a multitude of objectives through a broad range of statutes, regulations and other legal instruments, the degree of administrative support it grants this or that law in particular attests to both the extent of its support for the realization of its objectives and the importance of those objectives in relation to others.

Even in the application of a law or body of laws related to a given problem, the government must make choices when human and financial resources do not allow for their integrated application. In a most interesting study, now almost 20 years old, Wayne R. Lafave showed how, in the field of criminal justice, this lack of resources forced daily choices to be made as to how to act on an infraction.[141] Extending this analysis of

law in action still further, U.S. political scientist James Eisenstein arrived at the paradoxical conclusion that the deeper one burrows into government, the greater the discrepancy between the facts and the law.[142] Theory coincides with reality, he explains, where the visibility of decisions is greatest and differs most where decisions are least visible. Be that as it may, an increasing number of studies show beyond a doubt the existence of a discrepancy between written law and law as applied by government. For some 15 years, a growing interest has been observed in such studies in Canada. Unfortunately, much remains to be done, and major methodological problems must be cleared up if meaningful results are to be achieved.

In addition to Arthurs, who approaches the problem from a primarily theoretical angle, a number of authors involved in this research express grave concern about this aspect of judicial reality. With respect to consumer protection, for example, Belobaba, after clearly establishing that "the nature and extent of governmental commitment to, and enforcement of, its legislative initiatives, particularly in the consumer protection area, is dramatically relevant to legislative success or legislative failure,"[143] passes the following ruinous judgment:

> On this question of commitment and enforcement, governments at both the federal and provincial levels in Canada have failed miserably. Study after study is showing that there is little if any commitment by governments to enforce consumer legislation that is on the books or even to publicize its existence. From product safety regulation, to the prosecution of misleading advertising, to trade practices enforcement, to consumer product warranty regulation, to the provision of dispute resolution mechanisms — the emerging pattern of empirical studies suggests the existence of an enormous gap between statutory rhetoric and street-level enforcement reality. Legislation has been enacted, but it is not being enforced.[144]

Emond passes a similar judgment on the new environmental assessment procedures proposed several years ago in response to the problem of pollution:

> In spite of political enthusiasm for environmental assessment, politicians are not really committed to it. Fearful that a strong process will change if not undermine established modes of private and public decision making, many aspects of the process are designed to ensure relative ineffectiveness. First, the process imposes few firm obligations on anyone. At every turn, discretion ensures that the politicians (through the exempting procedures), the bureaucrats (through the prescreening mechanisms) and the proponents (through self-assessment) may effectively circumvent the objectives of environmental assessment.[145]

But it is one thing to note the limited willingness of governments to act on laws in certain areas, and another to explain and remedy this behaviour. If it is true that the problem is primarily political in nature, then the solution must above all be sought either through the improvement of the

political mechanisms themselves, or through a broadening of the consultation and participation processes. If, on the other hand, the problem is more a judicial one, in the sense that the choice of intervention instruments seems more or less suitable for the solution of the problems concerned, then it is the law itself that must be reassessed. For the courts cannot be blamed for exercising discretion when the law they must apply in a given situation is quite vague, nor can the government be accused of ill will when the law itself attacks the apparent rather than the real causes of problems. Whatever the explanation, it is to be feared that the failure of government to act on the law does not promote respect for the law in those for whom it is ultimately destined. To this point we now turn.

The Response of Those Targeted by the Law

Certain theories of law, in particular those belonging to the Scandinavian realist school,[146] tend to explain law in relation to the psychological reactions of those targeted by it, their sense that they are or are not bound by a rule of behaviour. While such theories lead to conclusions that are, at the very least, questioned, they have nevertheless helped demonstrate a key element of any reflection about the effectiveness of law, namely the reaction of those at whom it is directed.

Unfortunately, it must be acknowledged that law impact studies are still far from common. In defence of researchers, however, it should be added that the underlying scientific methodology of such analyses is particularly complex. Essentially, studies of this nature involve correlating a given situation (the so-called "anterior" situation) to another situation (the so-called "posterior" situation) following a clearly identified change in law. Many factors may influence the conclusions, such as the occurrence of similar events also likely to affect behaviour (rival hypotheses) and the use of measuring instruments that are not strictly identical for both periods.[147] It is understandable, then, that such analyses may easily spark criticism, particularly when harnessed for political ends.

More often than not they confine themselves to analyzing the impact of a particular decision, a new statute, a new regulation, or even a change in government policy. In the United States, for example, the first impact studies were of certain particularly controversial decisions, such as the *Schempp* decision forbidding prayer in the schools.[148] These were followed by an attempt to go further. Thus, in 1970 a volume was published with the ambitious title *The Impact of the United States Supreme Court*, in which the author, Stephen Wasby, examined the impact of the decisions of the highest court in the United States on no fewer than six different areas, including economic regulation.[149] Finally, more recently, with the development of interdisciplinary approaches to law, a growing number

of impact studies have appeared in various journals giving much attention to empirical studies.[150]

In Canada, there has been some, relatively moderate, movement in the same direction. However, rather than attempt to trace its various manifestations, which might easily prove unfair, here again we will consider only those studies carried out within the scope of this Commission's research that reflect fairly accurately both the development and the problematics of such impact studies.

The most explicit on the subject is Belobaba. From the outset, he acknowledges that impact studies in Canada have barely begun, at least as far as consumer protection is concerned. Despite this, on the basis of the few studies available, and one very exhaustive one in particular, which discusses the problem of warranties, Belobaba notes the limited impact law appears to have in this area. Two phenomena in particular draw his attention. Firstly, he notes:

> Few, if any, Canadian consumers even know about the existence of these laws purporting to protect them. A recent study has found that more than 60 percent of Canadian consumers cannot even identify one consumer right that they think they may have under federal or provincial law. This is a staggering empirical discovery. The fact that almost two-thirds of Canadians cannot even identify one consumer right carries not only an indictment of the modern regulatory state but also implications for informational and educational policy making. This lack of knowledge on the part of Canadian consumers is a point that is neglected time and time again by professional law reformers.[151]

But there is more still:

> Related to this lack of legislative impact and consumer ignorance of legal rights is the finding that only a tiny fraction of aggrieved consumers will ever bother to complain or take legal action in otherwise deserving situations. One study has found that although 14 percent of the consumers surveyed believed they were cheated or deceived in consumer transactions over the past year, fewer than two percent took any action, including complaint. Another study found that although one out of ten consumer products purchased over the past year were determined "faulty" by the consumer purchaser, the vast majority did nothing about it.[152]

From there it is just one step to the conclusion that there is a close link between people's knowledge of their rights and their exercise of those rights, and hence a need to better inform those for whose benefit the law is established. But for Belobaba, such empirical studies, useful as they may be, cannot provide the final solution to the overall problem of consumer protection. In a context in which some theories go so far as to claim it is perhaps not useful, or even desirable, to attempt to protect the consumer, such studies may certainly contribute, from a pluralist stand-

point, to a more enlightened ruling, but they cannot impose choices which, in the end, are political.

Weiler, in his study of the role of law in labour relations, also questions the actual impact of law. He uses the particularly interesting approach of examining the extent to which the expectations of the legislator in adopting a new Canadian labour law system after World War II found concrete form in reality. Three questions in particular hold his attention. Has the system helped reduce work stoppages? Has it allowed for increased unionization? Has it helped increase the income and purchasing power of workers? Using various statistics on the number of days of work lost because of work stoppages, the total number of unionized workers in Canada, and, finally, the distribution of income, he comes up with a mixed profile. The new labour system does not appear to have had a significant impact on work stoppages, but does appear to have helped increase the unionization of workers, although Canada is well behind a number of other countries in this regard, and the unionization rate is presently on the decline. Finally, the new labour system seems to have helped increase the income of unionized workers appreciably, on the order of 10–17 percent, as compared to nonunionized workers. But, as Weiler freely admits, these statistics do not always give an accurate picture of reality. Finally, he also concludes that it is less with respect to strictly economic gains, but rather with respect to the recognition of the new power of the workers to participate in defining their conditions of work, that one must look for the most significant impact of the new work regime.[153]

A third approach to this difficult question of the impact of law is that taken by Emond. He analyzes a particular instance of pollution which extends back over nearly 40 years and which law has apparently been totally incapable of regulating. Court rulings, statutes, regulations, orders, all of these means in turn have been tried and have failed. About orders, for example, Emond writes: "Amendments, extensions, delays and non-compliance are characteristic of many control orders."[154] The approach, as may be observed, is far more descriptive than quantitative. In the end, it is rather difficult to draw any definite conclusion as to the effectiveness of law, for what the analysis shows, first and foremost, is a lack of political will to resolve the problem in question. Hence his conclusion that the problem of environmental protection is from the outset one of values.

Other authors also deal with the problem of the impact of law, but in a more secondary and general manner. On the whole, three observations in particular emerge. Firstly, existing studies allowing for an assessment of the impact of law are so few that our authors are somewhat reluctant to venture into this territory. Secondly, when they do so, either relying on existing studies or using their own approach, they generally conclude that law is relatively ineffective. Finally, any explanation they propose of this phe-

nomenon nearly always comes back to a question of values and political process. Could it be that the effectiveness of law as an instrument of economic and social policy essentially hinges on such questions?

Law and Values

It is not our express intention, in tackling this final theme, to outline any theory of values in law or to draw a profile of the various trends in philosophical thought on the subject. Simply to distinguish among those theories that see values as objective data, those that, in contrast, see them as purely subjective data, and, finally, those that attempt to go beyond this contrast would require a study in itself. Various writers have examined the question and we refer to them for an overview of the subject.[155]

Nevertheless it seems important to point out the existence of a nearly continuous preoccupation with values throughout the history of legal thought. From Plato to Aristotle, from Thomist naturalism to neo-Kantian idealism, the concept of values has been a focus of discourse about law. After World War II, when the need for a return to basic, objective values was being felt, renewed attempts were made to formulate "absolute norms of justice and minimum values that no positive law could violate"[156] [translation]. But the attempts made in this regard, in particular by Radbruch with his theory of the "nature of things," encountered the apparently insoluble problem of conflicts between values. Finally, more recently, new approaches, such as those of Fuller and Dworkin, were developed with a view to restoring the relation between law and ethics to a context taking greater account of "the balance of values and interests as it prevails in a given community at a given time"[157] [translation]. Whether or not one agrees, one can at least see in this clear evidence of a growing dissatisfaction with the formal rationality of positive law.

Having said this, we will limit ourselves here to establishing several lines of thought to guide our examination of the research studies prepared for the Commission. A number of distinctions made earlier may aptly introduce the problem that concerns us here. It is important to realize that the analysis of the relationship between law and values may differ greatly depending on the viewpoint of the analyst. If the analyst is the person targeted by law, that person will see law in relation to the values that prevail in his or her community; law will therefore be all the more accepted, or "internalized," the more closely it correponds to the values in question.[158] At the other extreme, the lawmaker will give greater value to law as an instrument of intervention insofar as the law, elevated almost to mythical status, "is perceived as being endowed with almost unassailable virtues, undeniable truth, and indisputable authority" [translation].[159] Between the two extremes, finally, the judge, and to

a lesser extent the public official, called on to apply the law in concrete situations, and therefore to adapt it to some extent, will be inclined to see law as rules supporting social values. In order to separate these different perspectives properly, we will distinguish between law seen as a value in itself and law seen as a medium for values.

This first distinction leads to another, equally important. When speaking of law as a value, it must be understood that the judgment made in this regard is likely to vary depending on the legal forms in question. No one will deny, for example, that the constitution, the ordinary statute, the regulation, and even the simple contract, as means of intervention, do not have the same significance; they do not convey the same message. It is sufficient to consider the sometimes emotional reactions prompted by the choice of an administrative mode of intervention (regulations, administrative tribunals) over a formal mode (statutes, ordinary courts) for this to become clear.

A third and final line of thought we intend to put forward concerns the major role that values appear to play in the adaptation of law to change. If it is true, as Guy Rocher suggests, that the same "strong" values of justice and equality may just as easily serve to support as to challenge the existing legal system, then it is important to increase the visibility of the discourse about values in the process of formulating law.[160] In this regard, one must recognize that, however controversial his conclusions, Hayek has not hesitated to confront this question of values head on, virtually hinging his reasoning on it.[161]

It now remains to be seen how the authors involved in this phase of the Commission's research see the problem of values in law. This study will be all the more revealing as virtually all of them, as Liora Salter points out, consider the question of values in their examination of law and legal institutions.

Law as a Value

A practical approach to this issue of law as a value is to investigate why law is the instrument of intervention preferred over other forms of intervention. This is precisely the approach adopted by Arthurs, whose conclusions are shared by Rocher, the latter arguing from a more strictly sociological viewpoint, and therefore one external to law.

Arthurs argues that insofar as law is deeply rooted in Canadian political culture, it has the considerable advantage of legitimizing state intervention regardless of the merit of the policies advanced by the state. Thus, if a law has been validly adopted according to the Constitution, it must be obeyed, whether or not one agrees with it. Inversely, adds Arthurs, "The very absence of clear legislative root of title for state intervention provides its opponents with another basis of criticism, over and above that directed at the merits of the policy."[162]

The legitimacy attributed to intervention of a legal nature is so firmly rooted that the very disputing of law will often involve a reinterpretation of its fundamental principles.

> It is in this sense that we must understand attempts to claim that capital punishment is unconstitutional, that strikes are protected as the exercise of freedom of association, that commercial advertising is freedom of speech, or that the environment should be guaranteed protection by an amendment to the Charter.[163]

This at least partly explains a phenomenon observed at the Commission's hearings, namely the significant number of constitutional amendments sought. It must be understood, furthermore, that such proposals for constitutional amendment may just as well be designed to confirm some of the fundamental orientations of law as to bring about a change in direction. The example that immediately springs to mind here is the repeated demand to entrench in the Constitution the principle of property rights.

Rocher reaches appreciably the same conclusions, expressed, however, more in terms of values. One thing immediately becomes apparent in his view: Canada, he claims,

> is one of those countries in which, according to Max Weber's typology, the legitimacy of law is based above all on legal rationality. It is by virtue of constitutional laws that the state is established as an authority with recognized legitimacy, and the state exercises its power by means of a legal discourse (statutes, regulations, judicial decisions, directives). . . . For a society to legitimize political power and the exercise thereof on the basis of law, it must have reached a point where it assigns a high value to law. [Translation][164]

This esteem, continues Rocher, is expressed through a certain mythology of which evidence can easily be found in the concept citizens have of law. After listing a number of popular perceptions, he observes that esteem for law relies on four fundamental, or "strong" values: justice, equality, rationality and social order.

But what constitutes law's strength and explains its use may at the same time be seen as its weakness. Citing various adages that attest to a certain form of demythicization of law ("there is no justice," "laws are made for the rich," "laws are made to be broken"), Rocher concludes that underlying these judgments is the notion of a "good" law that would truly meet the requirements of justice, equality, rationality and social order. In other words, "These judgments express, in the negative, the feeling or hope that things could be different" [translation].[165] Thus, the very values that are the fulcrum of law at the same time demand its continuous transformation toward this ideal of "a democracy that is always in the making and never actually achieved" [translation].[166]

In reading the foregoing comments, it will be understood that this

fundamental ambivalence of law as a value may be interpreted differently from a more radical perspective. The fact is, admits Rocher, that if one sees the existing social order as based on inequality and injustice, "Law then is seen as a fraud, inasmuch as it camouflages social disorder while serving to create and maintain it" [translation].[167] In their study of social law, Bureau, Lippel and Lamarche adopt precisely this viewpoint, arguing that while the old ideas of justice, freedom and equality have been replaced by those of social justice, redistributive justice and national solidarity, social injustice still reigns despite past efforts to eliminate it. The truth, in their eyes, is "that there is no justification, in the ideological sense of the term, in basing law on the satisfaction of essential needs" [translation]; law derives rather from an "existential bias which is deeply lodged in the history of humanity and is sufficient unto itself" [translation].[168] But such a claim does not prevent Rocher from concluding that radical discourse, as demythicizing as it may be, evokes the possibility of another social order, which would be truly based on justice, equality and rationality, that is, on the "strong" values that form the basis of law. In this sense, this discourse also contributes to the assessment of law as an instrument of economic and social intervention.

One may agree or disagree with Rocher's viewpoint concerning law as a value. Some would lengthen or shorten the list of deeply rooted values. In any event, he should be given credit for clearly showing the dual perspective of the lawmaker and the person at whom law is directed in this regard and, in particular, the central role played by values in the adaptation of law to change, these values having the ability to delay as well as promote such adaptation.

However, there is a danger in thus speaking of law as a value, for the concept covers a variety of modes of intervention, ranging from the most to the least formal, from the most to the least restrictive, and these may be perceived very differently. In her study of law and values, Salter points up this difficulty, drawing on the example of a group of industrial hygienists involved on a committee to study the relationships between law and ethics at their level of activity.[169] Responsible for establishing voluntary occupational health and safety standards, they found themselves faced with a new hazard, that of liability suits for the decisions taken. Two points in particular emerge from Salter's summary of this committee's proceedings. First, the committee members established a clear distinction between law and ethics, law being regarded as a last resort when ethics failed. In their view, tackling an issue in legal terms never failed to divert attention from actually dealing with health and safety problems. In this sense, they saw law as an intrusion into their normal functioning. The second point is that the committee members, when they spoke of law in this way, were referring more to law and ordinary courts than to mere regulation, which they perceived as far more closely related to their concerns. A number of them, moreover, had

already collaborated in the drafting of regulations based on existing voluntary standards. Thus, the value accorded law varied substantially according to the nature of the legal intervention.

In comparing this view with that of the authors involved in the Commission's research, Salter observes some convergences and divergences of opinion. Several authors, she suggests, "would accept the premise that the orientation of much judicial process is defensive, and that a judicially oriented legal system potentially draws attention away from the issues at hand into issues of negligence, liability, fault and concern for due process."[170] It is enough to recall the viewpoints expressed by Emond and Weiler, among others, to be convinced of the soundness of this observation. Similarly, adds Salter, most of the authors accept the distinction drawn between law and legal process on the one hand and regulation on the other. But at the same time they do not see the distinction as clearly, law being expressed, in their view, in a far more varied fashion. With respect to the relation between law and values as well, they are inclined to see a far closer connection than do the hygienists. Not only is law in itself a value, but it reflects social values while helping, through the expectations it creates, to shape these values.

Law as a Vehicle of Social Values

In order to explain our authors' viewpoint concerning the relation between law and values, Salter makes a second comparison, this time involving a theoretical rather than a practical viewpoint, namely that of public choice theorists. Citing these theorists first, she writes:

> Unlike the hygienists, public choice theorists view law and values as inextricably linked. For public choice theorists, law is regarded as the end product of a legislative process reflecting the values of the members of society as consumers of political goods. Of course, one can locate legislative activity in the decisions made by the executive, regulatory agencies or the courts. To public choice theorists, committed to a particular version of democratic theory, this legislative activity occurring outside legislatures represents an aberration, a problem for policy makers. The close connection between law and values is severed when decisions are made that do not reflect consumer choice.[171]

From this general notion of the relation between law and values emerge a number of concrete suggestions:

> (a) removal of the legislative function from regulatory and executive officials and from the courts when possible; (b) the increased use of contracts between parties and criminal law sanctions to aid in the implementation and enforcement of guidelines and standards in this case mainly to avoid the formal legislative or regulatory process altogether; and (c) the formalization and specification of legal rules, particularly when law reflects social or collective values. . . .[172]

But this program of reform, which has the advantage of being both simple and radical, receives little support from the authors studied. This is either because they see it essentially as a political platform, a camouflage for the triumph of certain values over others, or because, while accepting certain elements of the underlying theoretical view, they feel that reality is far more complex than suggested by the public choice theorists. In short, they adopt a distinctly more relativist and pluralist viewpoint, in itself a rejection of this platform.

What the research reveals in particular, notes Salter, is that the state fulfills a multitude of roles and pursues a variety of objectives which help to create contradictory expectations with respect to law. In the field of labour relations, for example, Morin shows clearly how the state intervenes as guardian of the peace (to establish the general labour relations system), as occasional arbitrator (to settle labour disputes), and as employer (to determine contractually the working conditions of its own employees), these various roles at times becoming confused. Similarly, Beck shows the ambiguity of the objectives pursued by the state with respect to the business community, public interest dictating, on the one hand, that it compromise with business to create a climate favourable to economic development and investment and, on the other, that it distance itself in order to protect the worker, the consumer, the environment, and so on, more effectively. Garant mentions the particular position of Crown corporations, which are supposed to behave as autonomous entities and yet meet government expectations. Even in a field such as family law, Payne and Mossman clearly show the difficulty the state has in choosing between two conflicting notions, the one tending toward the independence of family members, the other toward their interdependence. In such a context, it may be difficult to decide on the objectives to be pursued and the means of intervention without taking into account the underlying value choices of such decisions.

Building upon the general conclusion of this research, Salter develops, in the second part of her study, a framework for analysis apt to promote more enlightened decision making at the level of state legal intervention by directly linking such intervention to certain value choices. She sees three broad approaches to law and regulation:

> The distinction between various approaches to law and regulation — between law as a "safety net," or as affecting the "quality of life" or as effecting "redistribution" — seems somewhat artificial at first glance. All laws create "safety nets," have some influence on the "quality of life" and have redistributive aspects. Viewing each of these aspects of law as characteristics of different approaches to law and regulation is more than a heuristic device, however. A law whose primary orientation is to create a safety net will be different from one oriented primarily to achieving quality of life values or from another designed to redistribute resources. Focussing on the different approaches to lawmaking allows us to lay bare the value

implications and policy options that follow from emphasizing one aspect of any law over another.[173]

For each of these approaches, Salter proposes an identical procedure, beginning with a fairly extensive definition of the approach in question, followed by identification of the value implications and the conditions for success at the level of implementation, and ending with the investigation of specific applications. It would take too long to summarize here her comments in these various areas. What the second part of her study clearly indicates is that various forms of legal intervention convey different symbolic messages with respect to values, and that taking greater account of these messages may lead to a more effective use of law, given the objectives pursued. Salter's view of the relation between law and values is largely consistent with that adopted by this research, particularly as it falls midway between two distinct perceptions of this relation, one emphasizing the values related to the choice of the form of law, the other emphasizing the values related to the content of law. In other words, the fundamental idea advanced is that form must be adapted to function symbolically and in substance if law is to attain the objectives set for it in terms of social change.

Without rejecting this view, some authors nevertheless point out how difficult it is for law to evolve according to new values when its concepts, its basic principles, and its very structure already reflect deep-seated values incompatible with the proposed changes. We have already pointed out, for example, the relative pessimism of Emond regarding the possibility of common law and the courts ever being able to protect the environment other than in terms of individual rights, a situation he feels can lead only to a dead end. Morin and Weiler, in their respective studies, make similar observations about the difficult adaptation of the courts to new concepts in the field of labour relations. Guy Rocher reiterates this same concern when he points out the pre-eminence of the individual and of private property in Canadian law.

Seen from this standpoint, values appear to be as much an obstacle to as a stimulus of change. In some cases, in fact, the pressures exerted by certain conflicting values come close to shattering the law, without any new direction clearly emerging. One example in Canada that immediately comes to mind is that of abortion, where juries with new values have refused to carry out the legislation however clear in its requirements.[174] Ultimately, however, law must adapt to the changes that occur in social values or risk losing its authority and effectiveness. What Salter suggests specifically is that rendering value choices explicit may help in the formulation of policies and the determination of the mode of legal intervention. This suggestion certainly offers no miracle solution: use of a value argument, in fact, can at times be tantamount to ending debate. But the mere realization that this can be done is in itself a step forward.

In due course, the value debate must take place in the open and be brought to a conclusion, at least temporarily.

Salter's argument in favour of a closer relationship between law and values, supported in general by the research, appears to be symptomatic of a distinct disenchantment with legal positivism and its illusory formalism, and of a willingness to create a closer link between law and those it affects. On this last point, there are two views. The first emphasizes greater consultation and participation on the part of citizens in decision-making processes resulting in the formulation of law. This seems to be supported to varying degrees by several authors involved in our research. But such an approach, as Salter points out, has an obvious limitation in that the state quite simply cannot meet all the expectations of the numerous interest groups that already exist. These expectations, moreover, are often contradictory. The second approach, a more radical one, takes somewhat the opposite course. Rather than promote the more active participation of citizens in the decision-making process at a higher, centralized level, it recommends bringing the formulation of law down to the level of spontaneous citizens' groups. Such is the approach proposed, from very different viewpoints, by both Hayek and Unger. Unfortunately, it remains difficult to see how such a major change could actually come about, at least in the near future. For the time being, and regardless of the merit of these two approaches, one can only observe that law is less and less the undisputed instrument of state intervention it has always been. Still identified with the state, its role is being challenged, as is that of the state itself.

Conclusion

At the end of this overview, in which we have tried primarily to explain the viewpoints of our various authors with regard to the role of law as an instrument of economic and social development, one conclusion is particularly clear. Law is less and less the undisputed and undeniable instrument of state intervention it once was. We might go so far as to say that law is in a state of crisis. This crisis is reflected in the comments of the authors, in which at times one detects some pessimism, but above all, and more generally, a clear loss of confidence in the ability of law to satisfy the many demands made by society upon it. It is not that the legal instruments are not sufficiently numerous or varied to meet the need. The problem is rather that in a context in which social consensus seems to be deteriorating and values are changing considerably, lawmakers are having more and more difficulty in defining the priorities for appropriate action. The result is that from being an instrument of politics law is becoming a substitute for politics.

Traditional legal positivism, marked by its formalism and its theoretical neutrality, oriented first and foremost toward the individual, has

been replaced, at least in part, by a new, more interventionist approach, oriented toward the attainment of specific socio-economic objectives in specific situations, an approach described, in contrast to the first, as substantive. But this latter approach, exemplified by the advent of the "welfare state" and the accelerated development of regulations, seems itself to be headed for a dead end insofar as the growing number of state legal interventions is seen to lead to confused, if not contradictory, results. Some authors state unequivocally that the legalization of society has reached a point of diminishing returns.

The solution to this problem, according to some, is obvious: there must be a concerted effort to "delegalize," "deregulate," "dejudicialize" society. But such a step, insofar as it is apt to lead to a revival of traditional legal formalism with its underlying values, is far from unanimously advocated. Within society itself, the clamour of the business community for accelerated deregulation is countered by the repeated demands of a host of interest groups seeking the assistance and protection of law. In this context, it is both interesting and important to note that most of the authors involved in our research regard the present trend toward deregulation with scepticism.

What our authors recommend instead, as a solution to the present crisis, is an approach that falls midway between the formal and substantive concepts of law. Theirs is an essentially pluralist approach, which takes greater account of the diversity of the forms of legal intervention and draws a closer connection between these and the concerns and values of those they affect. In short, it is a more realistic approach, which accepts the limitations of human rationality. Our researchers' comments in this regard are not intended to be theoretical. They reflect more the understanding and experience of individuals deeply concerned about the problem of law's effectiveness. But it is difficult not to associate their views with certain recent theories that tend to show law evolving toward the structuring of new, decentralized means of formulation. If such is to be the case, one might truly speak, then, of a major transformation of law, a transformation likely to have a significant impact on policy making in the years to come.

Notes

This study is a translation of the original French-language text, which was completed in September 1985.

1. W. Friedmann, *Law in a Changing Society* (London: Stevens and Sons, 1959), p. ix.
2. H.W. Arthurs, "Law as an Instrument of State Intervention: A Framework for Enquiry," in this volume.
3. Conseil du patronat du Québec, "Brief," November 2, 1983.
4. Bell Canada Enterprises Inc., oral presentation to the Royal Commission on the Economic Union and Development Prospects for Canada, Montreal, November 1, 1983.
5. British Columbia Law Union, "Brief," September 9, 1983.

6. Lawrence H. Tribe, "Too Much Law, Too Little Justice: An Argument for Delegalizing America," *The Atlantic*, July 10, 1979, p. 25.
7. Ibid., p. 26.
8. *The Chronicle of Higher Education*, May 4, 1983, "Harvard's Bock Urges Changing Expensive, Inefficient, Legal System," p. 8.
9. Ibid., "Excerpts from the Report."
10. See, for example, the series of articles published in the *Economist* on July 30, August 6, August 13 and August 20, 1985, the first of which is significantly entitled "English Justice: A Legal System under Stress."
11. For a schematic presentation of the critical legal studies movement, its sources and its direction, see Jerome Bickenbach, "CLS and CLS-ers" (1984), 9 *Queen's Law Journal* 263. The most often quoted study is the one by Robert M. Unger, *Law in Modern Society* (New York: Free Press, 1976).
12. On legal pluralism, see, among others, the excellent study by Jean-Guy Belley "L'État et la régulation juridique des sociétés globales," in (1986), 18 *Sociologie et Sociétés*, forthcoming.
13. To repeat the words of Guy Rocher, "Canadian Law from a Sociological Perspective," in this volume.
14. Arthurs, *supra*, note 2.
15. Liora Salter, "Law and Values," in this volume.
16. Ibid.
17. Among incentive measures, subsidies, which are in the forefront, clearly come close to legislative intervention when they entail certain conditions. Here we find again the familiar problem in Canadian constitutional law of federal interventions in the form of conditional subsidies.
18. Arthurs, *supra*, note 2.
19. Jerome Frank, *Law and the Modern Mind*, 2d ed. (Magnolia, Mass.: Peter Smith, 1963), p. 50.
20. On this intrastate conception of legal pluralism, see Belley, *supra*, note 12.
21. On this subject see, for example, Peter Fitzpatrick "Law and Societies" (1984), 22 *Osgoode Hall Law Journal* 115; and Stuart Henry, *Private Justice* (Boston: Routledge and Kegan Paul, 1983).
22. Edward P. Belobaba, "The Development of Consumer Protection Legislation in Canada: 1945 to 1984," in *Consumer Protection, Environmental Law and Corporate Power*, volume 50 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985). Joseph M. Weiler, "The Role of Law in Labour Relations," in *Labour Law and Urban Law in Canada*, volume 51 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
23. Salter, *supra*, note 15.
24. Patrick J. Monahan, "The Supreme Court and the Economy," in *The Supreme Court of Canada as an Instrument of Political Change*, volume 47 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
25. Roderick A. Macdonald, "Understanding Regulation by Regulations," in *Regulations, Crown Corporations and Administrative Tribunals*, volume 48 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
26. David J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984," in *Regulations, Crown Corporations and Administrative Tribunals*, volume 48 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
27. Macdonald, *supra*, note 25.
28. Arthurs, *supra*, note 2.

29. Stanley M. Makuch, "Urban Law and Policy Development in Canada: The Myth and the Reality," in *Labour Law and Urban Law in Canada*, volume 51 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
30. In this regard the report of the working group established by the GATT in order to study the administration of the *Foreign Investment Review Act* in the light of the provisions of the General Agreement is revealing. An important part of the report discusses Canada's argument that the word "prescription" in article III(4) should be interpreted in relation to the words "laws and rules" and in this context it should be defined as a mandatory rule with general application, with the exception of agreements of the kind provided for by Canadian law, and simple contractual obligations of private law of an individual foreign investor. This restrictive interpretation was to be rejected by the working group. See *Basic Instruments and Selected Documents*, Supplement No. 30, p. 147.
31. Kenneth Wiltshire, "Working with Intergovernmental Agreements: The Canadian and Australian Experience" (1980), 23 *Canadian Public Administration* 353–58.
32. Arthurs, *supra*, note 2.
33. Macdonald, *supra*, note 25.
34. Mullen, *supra*, note 26.
35. Patrice Garant, "Crown Corporations: Instruments of Economic Intervention — Legal Aspects," in *Regulations, Crown Corporations and Administrative Tribunals*, volume 48 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
36. Stanley M. Beck, "Corporate Power and Public Policy," in *Consumer Protection, Environmental Law and Corporate Power*, volume 50 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
37. Robert D. Bureau, Katherine Lippel and Lucie Lamarche, "The Evolution and Trends of Social Welfare Legislation in Canada, 1940 to 1988," in *Family Law and Social Welfare Legislation in Canada*, volume 49 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
38. Beck, *supra*, note 36.
39. Ibid.
40. Belobaba, *supra*, note 22.
41. Ronald Lévy, "A Speculative Essay on the Ethics of Techno-Science," forthcoming in *Systems Research*, 1986.
42. Weiler, *supra*, note 22.
43. D. Paul Emond, "Environmental Law and Policy: A Retrospective Examination of the Canadian Experience," in *Consumer Protection, Environmental Law and Corporate Power*, volume 50 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
44. Julien Payne, "The Impact of Family Law in Canada on the Financial Consequences of Marriage Breakdown and Divorce," in *Family Law and Social Welfare Legislation in Canada*, volume 49 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
45. *Globe and Mail*, October 5, 1985, p. A-4. At the same conference, the Minister of Justice John Crosbie is reported to have said: "Rejection of existing limitations upon individual rights, without due consideration as to whether the limits so imposed are demonstrably justified in a free and democratic society, can only lead to disrespect for the rule of law and established institutions, including the courts" (ibid.).
46. This was several years ago, for the basic elements of Hayek's thinking can already be found in *The Road to Serfdom*, published in 1946. Here we refer more particularly to

his work *Droit, législation et liberté*, vol. 1, *Règles et ordre*, and vol. 2, *Le mirage de la justice sociale* (Paris: Presses universitaires de France, 1981).

47. Unger, *supra*, note 11, p. 203.
48. Hans Kelsen, *La théorie pure du droit* (Paris: Dalloz, 1962).
49. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).
50. Stephen D. Krasner, "Approaches to the State: Alternative Conceptions and Historical Dynamics" (1984), 16 *Comparative Politics* 223.
51. Ibid., p. 229.
52. Ibid., p. 223.
53. Ilene H. Nagel, "The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Releases" (1983), 17 *Law and Society Review* 481–82.
54. Eric Nordlinger, *On the Anatomy of the Democratic State* (Cambridge, Mass.: Harvard University Press, 1981).
55. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (New York: Cambridge University Press, 1982).
56. Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton, N.J.: Princeton University Press, 1975).
57. Gunther Teubner, "Substantive and Reflexive Elements in Modern Laws," (1983), 17 *Law and Society Review* 239. See also, for a critique of this point of view, Erhard Blankenburg, "The Poverty of Evolutionism: A Critique of Teubner's Case for Reflexive Law" (1984), 18 *Law and Society Review* 273, and Teubner's response, ibid., p. 291.
58. Ibid., p. 280.
59. Rocher, *supra*, note 13.
60. Monahan, *supra*, note 24.
61. Rocher, *supra*, note 13.
62. Ibid.
63. Bureau, Lippel and Lamarche, *supra*, note 37.
64. Ibid.
65. Ibid.
66. Belobaba, *supra*, note 22.
67. Ibid.
68. Beck, *supra*, note 36.
69. Fernand Morin, "The Use of Legislation to Control Labour Relations: The Quebec Experience," in *Labour Law and Urban Law in Canada*, volume 51 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
70. Arthurs, *supra*, note 2.
71. Weiler, *supra*, note 22.
72. Ibid.
73. Andrée Lajoie, Pierrette Mulazzi and Michèle Gamache, "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985," in *The Supreme Court of Canada as an Instrument of Political Change*, volume 47 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
74. Ibid.
75. Guy Tremblay, "The Supreme Court of Canada: Final Arbiter of Political Conflicts," in *The Supreme Court of Canada as an Instrument of Political Change*, volume 47 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
76. Emond, *supra*, note 43.
77. Ibid.
78. See, *supra*, note 7.
79. Macdonald, *supra*, note 25.

80. Payne, *supra*, note 44.
81. Ibid.
82. Ibid.
83. Weiler, *supra*, note 22.
84. Ibid.
85. Belobaba, *supra*, note 22.
86. Macdonald, *supra*, note 25.
87. To repeat André-Jean Arnaud, it is the rationality that applies at the time of the "law statement," i.e., the moment of decision to create a law. See *Critique de la raison jurdique*, vol. 1, *Où va la sociologie du droit*? (Paris: Librairie générale de droit et de jurisprudence, 1981), pp. 352–69.
88. F.A. Hayek, *Droit, législation et liberté*, vol. 2, *Le mirage de la justice sociale* (Paris: Presses universitaires de France, 1981), p. 70.
89. Morin, *supra*, note 69.
90. Weiler, *supra*, note 22.
91. Ibid.
92. Emond, *supra*, note 43.
93. Belobaba, *supra*, note 22.
94. Bureau, Lippel and Lamarche, *supra*, note 37.
95. Ibid., quoting Jean-Jacques Dupeyroux, *Évolution et tendances des systèmes de sécurité sociale des pays membres des communautés européennes et de la Grande Bretagne* (Luxembourg: European Coal and Steel Community, 1966), p. 17.
96. Morin, *supra*, note 69.
97. Belobaba, *supra*, note 22.
98. Arthurs, *supra*, note 2.
99. Macdonald, *supra*, note 25.
100. Emond, *supra*, note 43.
101. Ibid.
102. Morin, *supra*, note 69.
103. Makuch, *supra*, note 29.
104. Mary Jane Mossman, "Family Law and Social Welfare in Canada," in *Family Law and Social Welfare Legislation in Canada*, volume 49 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986).
105. Ibid.
106. Arthurs, *supra*, note 2.
107. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).
108. On the role of the judges, see, among others, Joel B. Grossman, "Dissenting Blocs on the Warren Court: A Study in Judicial Role Behaviour" (1968), 30 *Journal of Politics*, cited in L.M. Friedman and S. Macaulay, *Law and the Behavioral Sciences* (New York: Bobbs-Merrill, 1969), p. 828.
109. Morin, *supra*, note 69.
110. *Harrison v. Carswell*, [1976] 2 S.C.R. 200 at 218; see also *R. v. Big M. Drug Mart Ltd.* [1985] 1 S.C.R. 337.
111. Monahan, *supra*, note 24.
112. Ibid.
113. Ibid.
114. Ibid.
115. Ibid.
116. Beck, *supra*, note 36.
117. Mossman, *supra*, note 104.

118. Weiler, *supra*, note 22.
119. Rocher, *supra*, note 13.
120. Tremblay, *supra*, note 75.
121. Ibid.
122. Ibid.
123. Lajoie, Mulazzi and Gamache, *supra*, note 73.
124. Monahan, *supra*, note 24.
125. Makuch, *supra*, note 29.
126. Monahan, *supra*, note 24.
127. Weiler, *supra*, note 22.
128. Dworkin, *supra*, note 107.
129. Emond, *supra*, note 43.
130. Ibid.
131. Weiler, *supra*, note 22.
132. Monahan, *supra*, note 24.
133. Mullan, *supra*, note 26.
134. Ibid.
135. Ibid.
136. Weiler, *supra*, note 22.
137. Payne, *supra*, note 44, citing Rosalie Silberman Abella, "Procedural Aspects of Arrangements for Children upon Divorce in Canada" (1983), 61 *Can. Bar Rev.* 443 to 453.
138. Weiler, *supra*, note 22.
139. Payne, *supra*, note 44.
140. Arthurs, *supra*, note 2.
141. Wayne R. LeFave, *Arrest: The Decision to Take a Suspect into Custody* (Boston: Little Brown, 1965).
142. James Eisenstein, *Politics and the Legal Process* (New York: Harper and Row, 1973), pp. 317–28.
143. Belobaba, *supra*, note 22.
144. Ibid.
145. Emond, *supra*, note 43.
146. On Scandinavian realism in general, see Stig Stromhölm and Heinrich Vogel, *Le réalisme scandinave dans la philosophie du droit* (Paris: Librairie générale de droit et de jurisprudence, 1977). Among the representatives of this school, one should mention A. Hagerstrom, *Inquiries into the Nature of Law* (1953) and K. Olivecrona, *Law as a Fact*, 2d ed. (1971).
147. On this question see especially Richard Limpert, "Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypothesis" (1966), 1 *Law and Society Review* 111.
148. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). For the studies in question see Friedman and Macaulay, *supra*, note 108, chap. 51.
149. Stephen Wasby, *The Impact of the United States Supreme Court* (Homewood, Ill.: Dorsey Press, 1970).
150. Among others, *Law and Society Review*, *British Journal of Law and Sociology*, *Revue interdisciplinaire d'études juridiques*, etc.
151. Belobaba, *supra*, note 22.
152. Ibid.
153. Weiler, *supra*, note 22.
154. Emond, *supra*, note 43.
155. On these problems, see especially Christophe Grzegorczyk, *La théorie générale des valeurs et le droit* (Paris: Librairie générale de droit et de jurisprudence, 1982); see

also, more generally, on the subject of values, Peter Stein and John Shand, *Legal Values in Western Society* (Edinburgh: Edinburgh University Press, 1974).

156. W. Friedmann, *Théorie générale du droit* (Paris: Librairie générale de droit et de jurisprudence, 4th ed., 1965), p. 311.
157. Ibid., p. 157.
158. Grzegorczyk, *supra*, note 155, pp. 12–19.
159. Rocher, *supra*, note 13.
160. Ibid.
161. Hayek, *Droit, législation et liberté*, *supra*, note 46.
162. Arthurs, *supra*, note 2.
163. Ibid.
164. Rocher, *supra*, note 13.
165. Ibid.
166. Ibid.
167. Ibid.
168. Bureau, Lippel and Lamarche, *supra*, note 37.
169. Salter, *supra*, note 15.
170. Ibid.
171. Ibid.
172. Ibid.
173. Ibid.
174. See H. Dumont "L'abolition du crime d'avortement dans la perspective de la réforme du droit criminel" (1980–81), 15 *Revue juridique Thémis* 149. See also the argument presented by the defence in *R. v. Morgantaler* (1984) 47 O.R. (2d) 353 (Ont. H.C.) at 368 et seq.

2

Law as an Instrument of State Intervention: *A Framework for Enquiry*

HARRY W. ARTHURS

Introduction

This study was undertaken to assist the Royal Commission on the Economic Union and Development Prospects for Canada in evaluating legal research undertaken on its behalf, and in considering the feasibility of various proposals advanced to or by the Commission, insofar as they may ultimately involve the use of law as an instrument of state intervention.

This study is not an enquiry but "a framework for enquiry": it has no "conclusions" as such. Rather it seeks to identify a number of crucial points at which assumptions about law are likely to be made by researchers, by the Commission, or by those who are critically evaluating the work of both. These assumptions are not easily unpacked nor, once unpacked, conveniently reassembled. They raise such issues as:

- What is the nature of law?
- What is its relationship to politics, the economy and society?
- What value preferences are implied by state decisions to intervene or not intervene in social and economic activity? Or to intervene by means of law rather than otherwise?
- Which legal "instruments" or forms of intervention are most appropriate or efficient in particular circumstances?

Such issues — the list is partial, the phrasing terse — are implicit whenever we speak of law as an instrument of state intervention. It is the aim of this study to persuade all concerned to make the implicit explicit. To fail to do so is to risk at minimum misdiagnosis, and at most serious misadventure in the development and implementation of public policies.

This, no doubt, explains Chairman Macdonald's concern that "the way in which legal instruments have been used in the past and may be used in the future should be better understood" (Foreword, *Progress Report on Research*).

Perhaps the purpose of the study can be better illustrated than explained. Suppose this Commission were concerned about the effects of alcoholism on the Canadian economy and social life. (The supposition is not just fanciful: alcoholism has been judically identified as "an evil . . . so great and so general that . . . it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster" [1925] 1 A.C. at 412.) How might a legal researcher characterize and investigate this problem?

One might (a) assemble and classify all statutes and judicial holdings which "regulate" the use and abuse of alcohol; (b) specifically identify those with technical limitations which prevent more effective prosecution for over-indulgence; (c) speculate upon possible social causes of abuse and costs of enforcement, as a guide to new regulatory strategies; (d) investigate, in a rigorous empirical fashion, the economic costs of alcoholism and patterns of enforcement of existing laws; or (e) develop a well grounded theoretical perspective from which one could judge whether any form of legal intervention is likely to be effective in dealing with widespread social behaviour, or under what social and economic circumstances alcoholism becomes endemic, to whose prejudice or benefit, and with what ensuing applications of labels such as "deviance."

These last formulations (and possibly the earlier ones as well) contain the seeds of important normative judgments. Is community cohesion or welfare to be preferred over individual freedom of action? Are the calculable and non-calculable costs of suppression equal to or in excess of the costs of tolerance?

Depending on how one answers these questions, one might propose a particular strategy of legal intervention. But not all forms of intervention are likely to be equally effective in all situations. (Conventional criminal sanctions, for example, are notoriously ineffective in dealing with such problems.) How do various forms of intervention take shape, finding their way through political, economic, social, legislative, administrative, and judicial processes to the point of application, and how do they become (or not become) "effective"?

A brief study such as this cannot begin to offer useful guidance to the resolution of such questions even in the specific context of one social problem, let alone on a more general basis. To do so, it would have to reconcile the contending views of serious scholars in half a dozen intellectual disciplines, and carefully map the cultures of Canadian law

and politics, now but poorly sketched. Fortunately, the Commission has asked me for something else, for a "thinkpiece," a mnemonic device that will help everyone to remember what issues to raise and where to look for answers. That is what I aim to provide.

A Framework for Enquiry

As modern governments of all political stripes pursue their objectives, they often use legal forms. The purpose of law may be to require private actors to behave (or not to behave) in a particular way, to instruct public officials as to their functions, to authorize the expenditure or collection of funds, or to project symbols and proclaim norms that are intended to influence public or private decision making. But whatever its purposes, law is there; it is a fact of life for all of us. Much non-governmental economic and social behaviour therefore tends to be interpreted as if it were merely a reaction (or non-reaction) to the existence of law enacted by the state.

This interpretation may be simplistic. The content of law may be consciously addressed or unconsciously assumed, its requirements willingly embraced, unwillingly deferred to, deliberately avoided or simply ignored. And much behaviour — whether governmental or non-governmental — itself generates "law" of a sort, which proceeds from similar motives and elicits similar responses.

Moreover, pervasive recourse to law and legal forms seems to have engendered quite contradictory responses. On the one hand, law has come to be perceived in negative terms: it inhibits individual freedom; it is slow and stupid and has nothing to do with justice; it fails to deliver on its promises or overreaches itself and delivers too much; it is beyond the financial capacity and intellectual comprehension of ordinary citizens; it is a tool in the hands of the rich, the clever and the powerful, and both a cause and an effect of our having too many lawyers. On the other hand, we have just amended our Constitution to formally acknowledge the "rule of law" as a fundamental political premise of the state, and to make law — especially the Charter of Rights and Freedoms — an inescapable element in all public decision making. Surely it must have been anticipated that with law would come lawyers; and with the enhanced stature of law and lawyers a corresponding decline in the influence of other processes (such as politics) and actors (such as policemen). Nor is this faith in law a recent aberration in Canadian life. A standard response to any grievance or concern has been "there ought to be a law."

Law, in short, is identified as both the cause of, and the cure for, many of the ills of Canadian society. Whether it is either (or both) is an issue that must be addressed. Still it is at least clear that any attempt to assess the past or present, or to predict or prescribe the future, behaviour of the

Canadian state, economy or society must confront the issue of law. In so doing, a fundamental problem is presented: what do we mean by "law"? If we cannot answer this question, we cannot begin to assess law's role.

In the present context, there is an additional, practical reason for asking this question. A royal commission concerned about the performance of national institutions, about the extent and effects of public decision making in the economic sector, about the attainment of social justice and equity, must naturally undertake "legal" research — on the Constitution, on regulatory regimes, on welfare and tax laws. But such research has, in the past, all too often failed to articulate underlying assumptions or theories about what law is, how it works, and why it sometimes does not. By the same token, proposals to stimulate or constrain marketplace activity, to ameliorate its social effects, or to mobilize private or public power through the use of law have often failed to address specific questions about what kinds of law, operating through which legal forms, can best (if at all) accomplish particular purposes. Our ability to pursue and evaluate legal research, and explanations or proposals emanating from it, thus depends upon our sensitivity toward what is implicit, as well as what is explicit. We will accordingly seek to construct several analytical devices which may help to remind us of the need to identify and examine unstated assumptions and theories about law which underlie individual research studies undertaken for the Commission, to understand their implications, and to locate them in relation to larger themes in the political and legal culture of Canada.

It is beyond the scope of this study (perhaps any study) to offer a single comprehensive and wholly original definition of law, or even a full account of the numerous theories that seek to propound its general causes and universal effects. What may be helpful, and is realistically possible, however, is a simple map which will locate some of the principal routes to understanding law and its relationship to the state, economy and society. As well as locating these perspectives on law, our map will identify typical or representative legal functionaries associated with each. This is the business of the second part of this paper.

If we were to attempt extended accounts of how given laws have operated, or are assumed by each of these theories to have operated, we should again be defeated by problems of scope and complexity. However, in the third section, we will offer a relatively simple model of the life cycle of a "typical" regulatory statute. The moving parts of the model, as it were, can simulate a typical course of events as law emerges from its socio-political context, acts upon that context, and generates effects which are intended or unintended, the latter almost certainly including subsequent changes in the law itself. The explanatory power of different legal theories may then be harnessed to various aspects of the model, in order to generate further understandings.

Finally, it is not possible to stipulate with certainty that a given

combination of formal legal elements will yield a precisely predictable social or economic result. This is not to say that form has no relationship to function. An identification of formal factors that may enhance or diminish the effectiveness of law as an instrument of public policy may at least alert those who propose legal intervention to the necessity of conscious choice amongst various legal institutions, actors, procedures and modes of expression. The fourth section will briefly explore some of these choices, and relate them to their political context.

In addressing these questions, this study assumes the continued existence in Canada of something resembling our present liberal-democratic state, with its warts-and-all mixed economy, and its sometimes unrealized aspirations to political, ethnic, social and cultural pluralism. These assumptions are not universally shared as a matter of either prediction or preference. The attempt, in the next section of this study, to typify ideas of law must therefore take account of a broad spectrum of ideologies and interpretations of social reality, and thus of notions of law, which will not necessarily be found within the Canadian mainstream.

On the other hand, the third section proposes a working model of regulation, and the fourth explores the connections amongst the legal forms, ostensible and latent functions, and political context of regulation. While each of these analyses will, it is hoped, prove compatible with a wide range of explanatory theories, they may not comport with some normative notions about how the Canadian economy ought to operate, or what would be best for Canadian society. For example, the working model assumes that regulation may be renewed and reshaped, but that it will indeed continue. Such an assumption may be rejected by those who espouse the undiluted free market as the way forward. The form/function analysis exhibits tolerance for a continuing dialectic between law and politics, a premise which will not be accepted by those who assert the need for radical revision.

In part, then, the analysis that follows is itself dictated by certain assumptions, but it is not dictated by those assumptions alone. It is also a function of the limited agenda to which this study as a whole is addressed. Essentially, the study is concerned with legal values and their relation to legal strategies, processes and institutions. It does not purport to address the question of whether regulation generates unacceptable distortions of the market, or is so ineffective as to leave those who wield great private power unconstrained, unaccountable, and perhaps even stronger. In part, such vital questions are addressed by other studies; in part, they are more likely to be resolved by political debate than by scholarly analysis.

But, so saying, an admission is in order. To assume that the Canadian state will continue to intervene vigorously in social and economic affairs, and that it will do so as a result of political decisions, is to reject other possibilities. And to reject one set of possibilities in favour of

another is to make a choice based on belief, not science. The choice I have made — more unequivocal than tentative, truth to tell — is somewhat out of fashion. Today, government is viewed with suspicion: the bigness associated with the interventionist state is regarded as an evil in itself; its confessed failures, new economic theories and the brute realities of a changing world order are said to have revealed the bankruptcy of Keynesianism, and consigned the welfare state to the realm of wishful thinking; indeed all political answers to economic problems are regarded with suspicion by both the left and the right. In the face of these perhaps overstated, but certainly widely held, views, my lingering affection for regulation is a touch deviant. Yet it does seem to me that so long as democracy persists, with it will persist the notion that the power of the state can and should be used to limit private power and advance the common good. And when the state acts democratically and deliberately in this way, it is regulating.

There: the reader is forewarned: in the "scientific" analysis that follows are buried predictive assumptions, and in those assumptions are buried value judgments. Let the reader now go and likewise confess his own assumptions and values.

Understandings about Law

People with practical law jobs and those who reflect upon and write about law obviously have certain understandings about what law is and how it works. Given the nature of their activities, it is relatively rare for legal professionals and others immersed in the workaday world of the legal system to devote much conscious thought to such understandings, or even to make them explicit. Nonetheless, however unconscious or inexplicit, professional understandings ground a structure of beliefs and action. For present purposes, we may refer to them as "assumptions" about law. Such assumptions, of course, are current not only in legal circles but as well in other contexts, such as the press, high school law courses, political discourse, and social conversation. "Assumptions" about law may be contrasted with "theories" about law, consciously evolved or adopted by those who seek to describe, explain or evaluate law in a systematic and often complex way.

But understandings — "assumptions" or "theories" — about law do not exist in isolation from understandings about other social phenomena. Specifically, notions of what the state is, and how it does and should relate to its citizens, are of great relevance to both legal thought and legal action. This is not to assert that "law" can be thought of only as state action, or that theories of the state necessarily encompass and determine all questions one might wish to ask about law. However, in a study generally concerned with law as an instrument of state interven-

tion, it is necessary to come to terms not only with varieties of legal understanding, but as well with varieties of political thought.

The relationship between these two sets of understandings — about law and about the state — requires some further explanation. On the one hand, it is important to appreciate that people who share common political values may have very different views about the way in which law can or should be used to advance those values, precisely because they differ in their assumptions or theories about law. For example, civil libertarians may share a deep commitment to certain principles, even agree upon what they imply in given circumstances, yet disagree on the issue of whether those principles should be vindicated through Charter litigation or political action. Their disagreement reflects opposing assumptions or theories concerning the legitimacy and likely effect of judicial intervention. On the other hand, people who have similar understandings of the nature and function of law may nonetheless be diametrically opposed in political perspective. For example, both those who favour and those who oppose anti-discrimination laws may believe that such legislation actually does alter hiring practices, while disagreeing on the social utility or morality of doing so.

Such disagreement may stimulate dialogue which leads to greater understanding. However, where there is a substantial confluence of views about both law and politics, there is a significant danger that consensus will serve as a substitute for analysis: if we all agree, there is no need to say what it is we all agree about. In abandoning analysis, however, in failing to make explicit our assumptions about both law and the state, we may do ourselves a disservice. We run the risk of misdiagnosing our ills, and misprescribing the cures, of adopting analyses that explain nothing, and policies that contradict each other at a deep and fundamental level. In short, we exercise unintended closure on debate, and write off the possible benefits of dialectic.

Our first step, therefore, will be to demonstrate to what extent our legal and political cultures might be said to contain diverse, inconsistent and opposing tendencies. Our second will be to suggest that, as a practical matter, the spectrum of "mainstream" views concerning both law and the state is quite narrow in Canada. The third step will be indicated, but must be taken by readers themselves: a reconsideration of their own legal-political analysis, or that of others, in light of the enlarged range of possibilities exposed by this exercise.

A final preliminary comment is in order concerning the mode of analysis used. Figure 2-1, in effect, provides a map which will enable us to locate the broadest range of views about law and politics. Its coordinates are plotted, like those on any map, by reference to longitude and latitude. On this map, degrees of longitude measure the distance between right and left on the political spectrum. More specifically, they

reflect the opposing tendencies of public ordering as against private, of state intervention as against laissez faire, with a broad, undefined liberal-democratic or pluralistic middle ground. Degrees of latitude, on the other hand, reflect intellectual or epistemological differences, with the northern hemisphere roughly encompassing the "assumptions" of those who do law jobs, and the southern the "theories" of those who think about law more systematically.

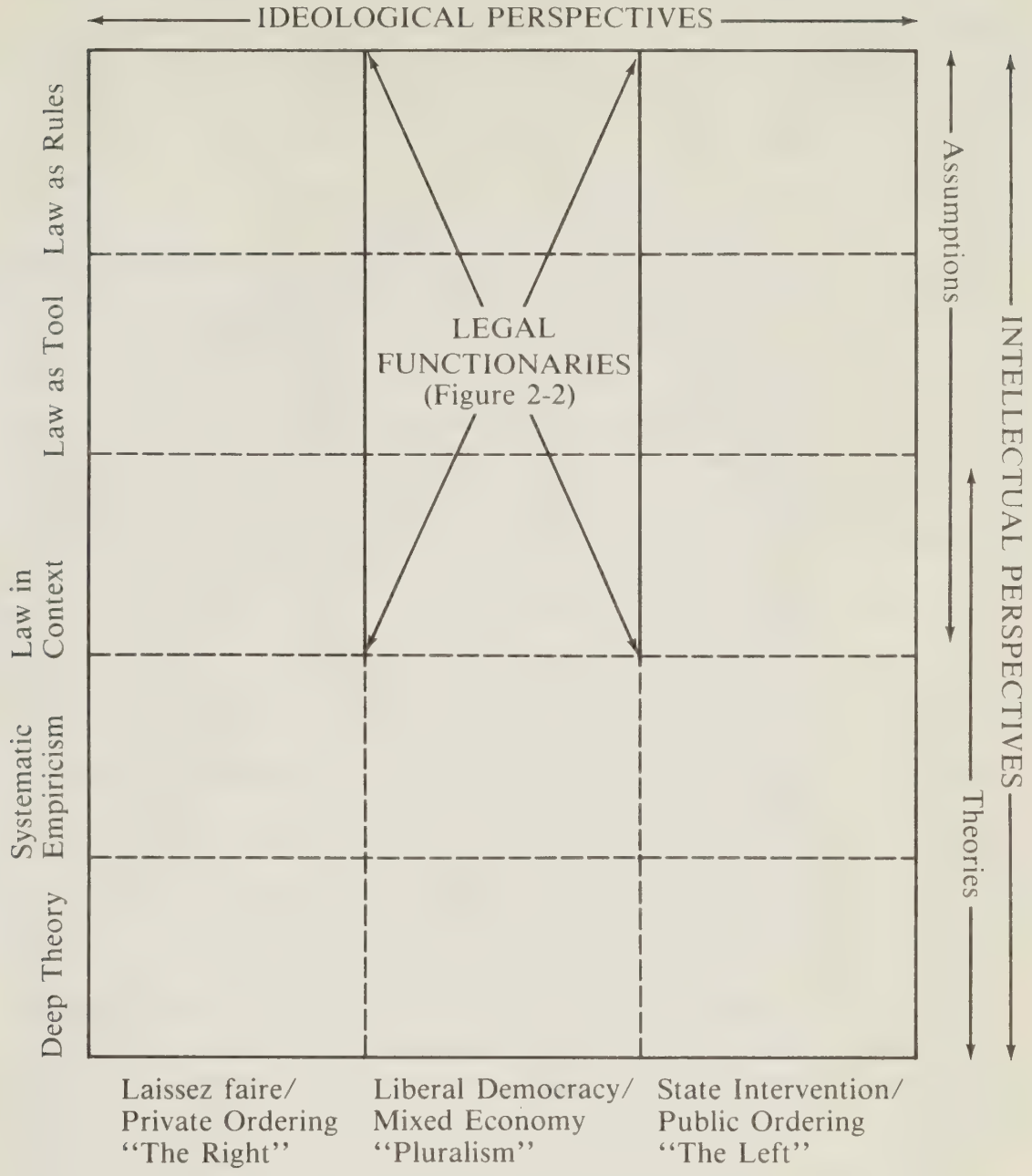
Of course, these notions of longitude and latitude, and the coordinates they yield, are just as arbitrary as those adopted as geographic conventions, while the promise of scientific accuracy they hold out is much more spurious. By locating a particular type of legal functionary at the intersection of typical political and legal assumptions, we obviously do not mean to convey that all such functionaries occupy the same position on all issues all the time. Rather, we are attempting to create a series of ideal types, i.e., combinations of characteristics which may be commonly found together in those who perform a particular role. The purpose of creating ideal types is to aid analysis by creating a kind of shorthand, rather than to develop a critique of individuals or their positions which is insensitive to nuance or detail. They are, in short, an organizing device and no more. Similarly, when we suggest that an individual legal theorist — even a general tendency in legal theory — embodies or exemplifies certain characteristics, there is no intention to ignore the shadings, complexities and levels of analysis that may characterize any particular position. Again, the purpose of assigning latitude and longitude to such individuals or tendencies is merely to draw attention to the general relationship their positions bear to the positions of others.

The imprecise nature and limited purpose of our map is symbolized by the use of broken lines to create categories of legal-political thought. However, a solid line is deliberately used to delimit the range of political views conventionally found amongst lawyers, judges and others closely identified with the functioning of our existing legal system. This is done to emphasize the close affinities amongst such individuals. But while their assumptions do not stretch across the full spectrum of possibilities, it should not be thought that positions of professionals and others working within the legal system are indistinguishable. On the contrary: it is precisely because they can and should be distinguished that they have been set aside for closer analysis below (Figure 2-2).

With this general introduction, we may now turn to a closer inspection of our "map," Figure 2-1.

The diagram, as stated, displays a range of political or ideological positions. In light of the Commission's primary interests, these positions are defined in terms of how they visualize the role of the state vis-à-vis the economy. Addressing only the positions that have some currency within our present Canadian political and intellectual discourse, one

FIGURE 2-1 Map of Understandings about Law



extreme is represented by classical, laissez faire liberalism, which subscribes to the view that the state ought to do no more than guarantee the operation of a competitive market economy, which should otherwise be free from its direction or control. At the other extreme is the socialist view, which assumes an extensive role for the state in the organization and direction of economic activity. In each case, the normative and the analytical interact. For example, much "law and economics" analysis discerns a tendency in the common law toward efficiency, which it regards as a positive good. Similarly, socialist theory identifies economic power as a fundamental constitutive element in social relationships, state policy, and ultimately law, and therefore seeks to appropriate, regulate or otherwise subordinate such power.

Between these two, and shading imperceptibly into both, is the dominant, pragmatic Canadian position, which may be described as political pluralism. This position assumes both the existence and desirability of a mixed economy, with the state guaranteeing the integrity of the market and the autonomy of individual action, while also functioning where needed as a provider of services, an entrepreneur, a regulator and the architect of macroeconomic policies, which necessarily impinge upon the behaviour of private actors in the marketplace.

It is important to note again that these positions are neither mutually exclusive nor exhaustive of the possibilities. The ideological position of at least some writing about law is not its most salient characteristic. Some ideological positions, such as those of the "Red Tory" and the anarchist, cannot be located easily for all purposes at any given point on the spectrum. Moreover, there are relatively few "purists" at either end of the spectrum, and many positions that tend toward the middle. Since the middle is by definition pluralist, it accommodates significant divergence of views on any given issue, and inconsistency of position from issue to issue. Finally, a number of "political" issues — peace, ecology, and sexual emancipation, for example — may not necessarily be defined by everyone as a function of beliefs about the state's role in economic life. However, as the present exercise is largely directed toward understanding research on this latter area, it will serve as the litmus test for the identification of political or ideological positions.

When we turn from longitude to latitude, from ideology to understandings about law, it is important to recall earlier warnings about the limits of our map as an analytical device. Specifically, because different intellectual perspectives are complex, overlapping, indeed cumulative and interactive, they are separated by broken lines. A brief description of these intellectual perspectives, to complement the ideological perspectives already identified, is necessary before we can begin to use our "map."

At the bottom of the chart we see the category of "deep theory." Those who view law from this perspective are concerned to identify the organizing principles or constitutive forces that give shape and meaning to law. Their technique is essentially speculative. In contradistinction, "systematic empiricism," which is located at the next level in the chart, aspires to an understanding of law through a systematic investigation of the behaviour of the legal system and its social effects. Using disciplines such as psychology, sociology and economics, which treat law as an object of study rather than as a subject, empiricists tend to stand at a distance from the legal system, rather than inside it. Their attention focusses not upon the content of legal rules but upon the social events and forces that shape the legal system and determine its impact. The two perspectives are, of course, related. Much deep theory is informed, and challenged, by empirical research, while empirical researchers depend

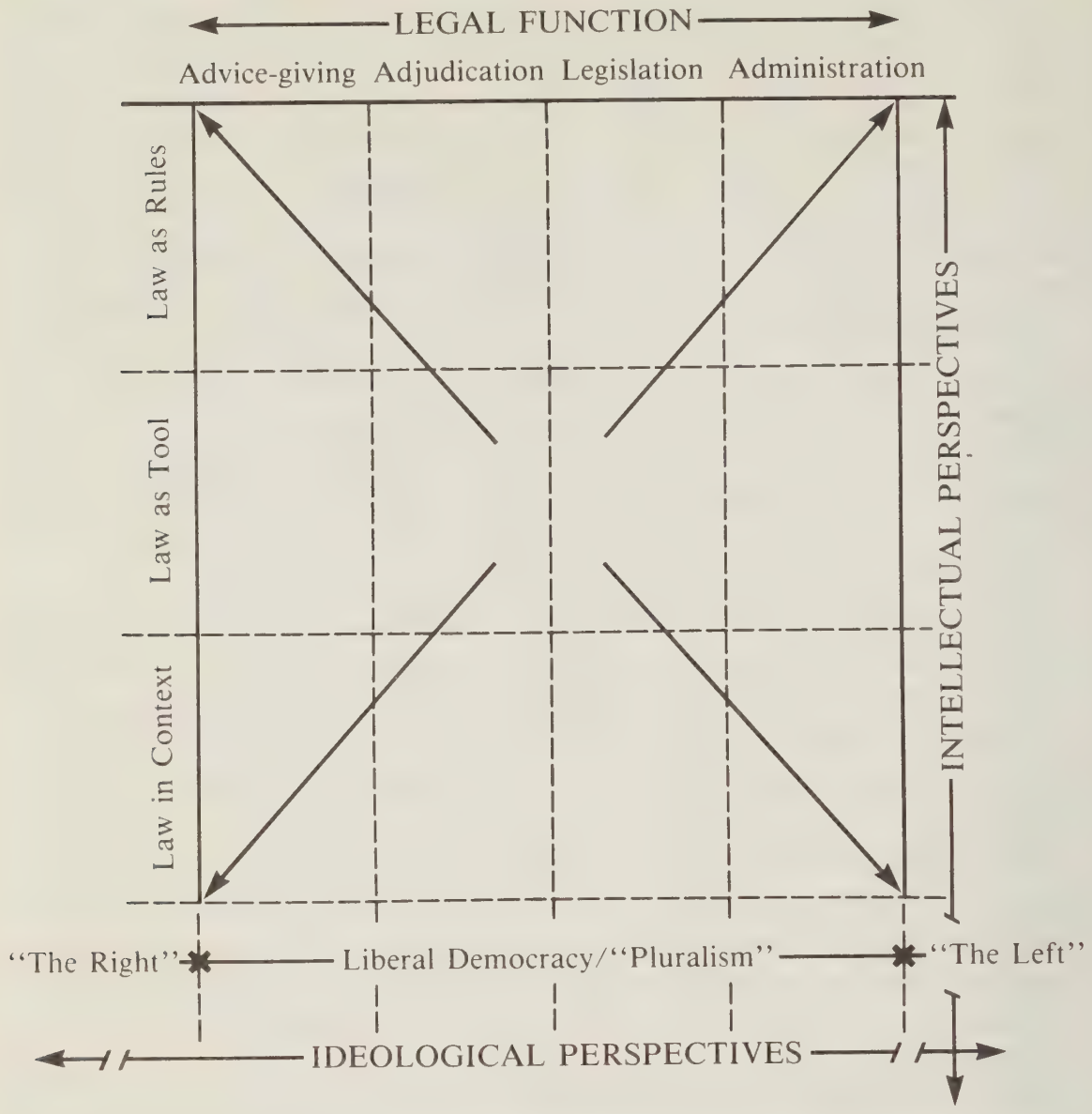
to some extent upon theoretical speculation both for their agenda and their methodology.

Earlier, we spoke metaphorically of the northern and southern hemispheres of our map, the latter encompassing theories and the former assumptions commonly held by those who work within the system. The position we have described as "law in context" is located, in effect, at the equator. The "ideal-type" adherents of this point of view are often law professors and legal policy makers or, on occasion, judges or practitioners with atypically broad intellectual interests or deep social sensibilities. They tend to accept in principle that both deep theory and the findings of systematic empirical investigation are pertinent to an understanding of law, although they do not themselves necessarily engage in such enquiries. Rather, they seek to use the outcome of social science and speculative scholarship to challenge conventional legal understandings, and to "reform" legal institutions and rules. In this sense, they represent the midpoint on a progression from an external to an internal perspective on law, as well as from explicit theory to implicit assumptions.

We next traverse the terrain of the "northern hemisphere," the natural habitat of lawyers, judges, legislative counsel, policemen, officials and doctrinal legal scholars. The notion that law is a "tool," an instrument to be picked up, used, and put down again, as circumstances warrant, is typical of many who engage in practical law jobs. For example, decisions about whether to settle or sue, whether to extend or limit the reach of existing rules, whether to issue a public appeal or pass a law, involve an awareness that choice is possible and, usually, an educated, pragmatic intuition about practicality and situation equity. Rather more removed from deep theory and systematic empiricism than exponents of law in context, those who operate with such a utilitarian view of law are perhaps more likely to make unfounded and erroneous assumptions about the suitability of the "tool" in a given situation. On the other hand, this risk may be somewhat discounted by their practical experience and close involvement in the task at hand.

Finally, the working assumption of some legal actors is that law is a body of rules. Whether functioning as lawyers, judges, officials or scholars, their concern is to ascertain, arrange and apply legal rules in a coherent and consistent fashion. This they may do while processing routine disputes or non-contentious business, while defining how such work should be done, or while monitoring adherence to or departures from the rules. To the extent that they are engaged in the application of rules, at least, such "ideal types" do not concern themselves with causes or effects: such matters are on other people's agendas, not theirs. Yet the very fact that they strive to ensure coherence and consistency in the application of rules points to a critical assumption implicit in their behaviour: the notion that legal coherence will project itself onto events in the "real world," by creating a sense of predictability or certainty as

FIGURE 2-2 Assumptions of Legal Functionaries about Law



an organizing principle for behaviour, or by reinforcing whatever value or principle is embodied in the rule as a deterrent to violations.

We must take note of this assumption in passing. Although it is highly problematic, it has at least two consequences for this study. First, it is part of the paradigm that underlies much legal activity, and must therefore be reckoned with in assessing legal outcomes (judgments, articles, etc.) as sources of guidance in policy development. Second, it also influences popular expectations of law, and in that sense must be regarded as a limiting factor in proposals to use law to advance social goals.

However, assumptions concerning legal coherence and its effects are only a few of the special aspects of professional thought that must be addressed when legal research is being evaluated. Other assumptions will emerge from closer scrutiny of the northern hemisphere of our map of legal/political understandings, the natural habitat of professional

"ideal types." To facilitate that scrutiny, we may offer an enlarged section of the map (Figure 2-2).

From a distance, it may have seemed that all legal professionals share a common ideological position of political pluralism. On closer scrutiny, it appears that the particular law jobs they perform may tend somewhat to distribute them across an ideological spectrum, albeit a rather narrow one. Allowing always for the crude reductionism of the exercise, consider the typical political perspectives of those who provide legal advice and planning for individual and corporate clients, those who argue cases or adjudicate them in court, those who concern themselves with the formulation of new laws, and those who administer law.

It would be surprising if those who primarily guide clients through processes of private ordering did not come to regard such processes as the norm and all forms of state intervention as aberrant, a conviction perhaps reinforced by repeated involvement in the structuring of transactions to escape regulatory requirements, minimize tax liability, or appropriate public goods. Similarly, advocates who are retained to defend clients charged with regulatory offences or to intercede with policy-making bodies to secure favourable treatment for clients may well be socialized by their clients, internalize their values, and come to share their antipathy to state intervention. Even judges, themselves representatives of the state and instruments of legal intervention, are trained and traditionally encouraged to think of themselves as a bulwark against abuse by the state. This self-image leads judges, often, to conclude that they cannot hold an even hand between citizen and state if they do not distance themselves to some extent from presumptions in favour of state action. Indeed, the very content of many legal rules and procedures, which emerged in the context of efforts to resist regulation, serves to reinforce and legitimate these attitudes.

By contrast, legal functionaries who conceive, develop and administer regulatory regimes may not be committed to state intervention as a general ideology, but at least their own experience and interests may predispose them to less hostile attitudes than those of private practitioners. This hypothesis, of course, does not extend to regulators explicitly mandated to wind down an existing regime of intervention, to those made cynical by exposure to "politics," used pejoratively, or to those who have been captured by the very interests they were intended to control. Moreover, policy makers and legislators opposed to state intervention are today very much in evidence. Still it is much less possible to discern dramatic changes in levels of intervention, although its direction may well have shifted, producing capitalist parodies of socialist programs.

Yet it must be said that shadings of ideology within the ranks of legal functionaries seldom yield extreme diversity of view. Three factors tend to confine them within the moderate, pluralist middle.

First, there is the recruitment and training of lawyers. Drawn, as they disproportionately are, from the ranks of middle class, managerial and professional families, and socialized into an acceptance of legal processes as a preferred mode of conflict resolution, they have been neither radicalized by personal experience nor trained to see themselves as *conquistadores* or *communards*. As ideal types (though not, of course, as individuals) lawyers tend to be "sensible," phlegmatic, and secondary rather than prime movers.

Second, and more important, is the nature of law itself. Exceptional moments and movements apart, one of the characteristics of modern law is said to be its rationality. It more or less serves, expresses, is formed by, the predominant values of a society, and does so through instrumentalities that operate more or less efficiently. Thus, one would expect that legal functionaries would likely share generally prevailing assumptions about state intervention. And, it must be remembered that, as members or close allies of various dominant elites who have constructed the status quo, lawyers help to shape the very assumptions to which they often conform. Those assumptions, in Canada, have included the inevitability of a considerable public sector, and of relatively widespread regulation.

Third, perhaps a cause, perhaps an effect, of the previous two points, Canadian legal scholarship has been particularly slow to pass from taxonomic concerns (the systematic organization of legal rules) to an evaluation of law's social, and especially its ideological, significance. The legal culture of Canada (as compared to that of the United States, England, even Australia) is unusually pluralist, if uncontemplative acceptance of a variety of often conflicting assumptions can be so described.

In summary, while one can identify the occasional and atypical Marxist or fervent free enterprise, libertarian lawyer, a poll of the bar's political positions would probably register a spread of views only marginally to the right of the general population, and almost entirely within the mainstream. Hence the solid line which bounds this territory on our map.

If this description of the ideology of legal functionaries is somewhere near accurate, we may now turn our attention to the way in which ideas about state intervention are affected by the typical intellectual perspectives of lawyers. Figure 2-2, it will be recalled, is essentially an enlargement of the northern hemisphere of our overall map. Thus, we have virtually written off the possibility that thinking about law by legal professionals is well grounded in either empirical enquiry or speculation concerning deep theory. There are likely to be two rejoinders to this dismissive assertion.

First, it may be challenged on the facts. Legal professionals, some may argue, are indeed no less thoughtful or well informed than anyone

else, and their research and policy proposals are entitled to no less respect. What lawyers may lose because they are not involved in other types of intellectual enquiry, they more than make up in their distinctive analytical acuity, their capacity to quickly master other people's special knowledge, and their talent for synthesis, articulate statement, and practical solutions. Finally, the argument runs, there is one field of knowledge in which legal professionals are, undeniably, expert: law. As custodians of both constitutional values and practical legal techniques, lawyers ought to enjoy precedence in rank over lesser breeds without the law in any project designed to assess law's performance or potential, or to prescribe its form or content.

There is some validity in these arguments. Familiars of any system, including the legal system, doubtless do possess forms of tacit knowledge denied to outsiders, and the ability to "do things" which others cannot. But these special qualities attenuate as the boundaries of the system are approached, and seldom extend beyond them. Thus, we ought to be wary of attempts to evaluate the efficiency of the legal system which are based upon such tacit knowledge alone, and insist that proposals concerning changes in its design take account of all intellectual perspectives that might help us to understand law's relationship to the social and economic systems it purports to serve or supersede.

It is precisely in this regard that those who see "law in context" can have their greatest impact. They can facilitate, as it were, a north-south dialogue between the two hemispheres of understanding, by opening up debate within legal circles to the penetration of ideas generated in other realms of discourse. Moreover, they can sometimes provide, to those who see law from an external perspective, insights that would be inaccessible to anyone who did not know the legal system first-hand. But the task of an interlocutor is a delicate one, and there is always a risk of enhancing rather than diminishing misunderstanding. Most particularly, it is important that assertions about the relationship amongst law, society and the economy be constantly checked against developments in understandings about that relationship as they emerge elsewhere in the world of learning. This requires both the existence of developmental work and a trained capacity on the part of "law in context" practitioners to comprehend and evaluate such work.

Neither of these conditions can be said to exist in Canada today. Socio-legal and theoretical research on law (whether conducted by scholars trained in law or in other disciplines) is much less than adequate, and the intellectual repertoire of knowledgeable "law in context" analysts within the legal system hardly more so. What substitutes for the well-informed transmission of sophisticated ideas and accurate information is too often merely well-intentioned approximation or, occasionally, unwarranted idolatry. And the information and ideas are themselves

often manufactured abroad and imported from other societies with their own distinctive social and economic systems, and political and legal cultures.

So much, then, for the first argument that the Canadian legal system presently has the capacity to generate all understandings needed to respond to all enquiries concerning the use of law as a technique of state intervention. An ancient plea — "confession and avoidance" — might aptly describe a second line of defence by legal functionaries of their limited techniques for understanding law.

It would be framed thus: It is conceded that broader and deeper intellectual insights are needed than are usually generated by discussions amongst legal functionaries. But this is beside the point. Lawyers, judges, administrators and policemen do not purport to be scientists; they are merely practical technicians. Let others decide what the problem is and what is to be done, and these legal actors will show them how to do it; or, if preferred, tell the legal actors how to do it as well, and that is the way it will be done. "Law is a tool" — "law is rules."

Like the first argument, the second is not without its virtues, including that of modesty. But it also has its weaknesses: it is not necessarily possible to divorce means from ends, and spirit from letter.

To address first the question of law as a tool, we must recall that legal functionaries tend to view formal adjudication as a preferred process for resolving all kinds of issues. Formal adjudication has been adopted, on the advice of counsel, as the way to mediate political disputes through Charter litigation, the misbehaviour of children and abortion decisions through specialized, court-like tribunals, standards of market behaviour and the appropriateness of resource development through adversarial confrontation. We have yet to receive and pay counsel's bill. But the price of using law as a tool may well turn out to be a high one, including the atrophying of political activism, the unintended exacerbation of personal and social misfortune, and the conferring of further advantages upon already dominant economic interests.

And to turn to the notion that legal functionaries will merely transcribe orders and enforce rules, this claim is not to be taken seriously.

Even such an apparently non-controversial, expert task as statutory drafting involves elements of choice. Decisions about whether to express policies in tight, technical phrases or looser structures of speech influence the extent to which legislation can be understood, administered and evaluated by lay people. When rules come to be applied, after legislation is adopted, those who apply them almost always enjoy some field of discretion within which they make their own judgments. For a legal functionary to assert that he is merely bowing to the commands of the legislature, acting beyond politics or even beyond controversy, automatically and without choice, is to obfuscate. To deny the existence

in every judgment of a residual element of personal choice is to obstruct both understanding and the possibility of change. Finally, even the most monkish compiler and codifier of legal rules is making choices: categories he devises will influence our perception of future events, and extend or limit our notions of relevance.

This description of the northern or professional hemisphere of our map has suggested not only the existence of a relatively narrow spectrum of ideological positions, but virtual isolation from the intellectual perspectives of systematic empiricism and deep theory. As our attention shifts to the southern hemisphere, comprising these perspectives, a further limitation on our analysis suggests itself. Thus far, we have been, in effect, examining the world in only two dimensions. We have not taken care to define certain topographical features whose salience now becomes central. It is those features especially which enable us to identify continuities and controversies amongst theorists and empiricists.

First, there is intellectual climate. We should expect that those whose full-time occupation is the construction of social theory or the investigation of social facts would work in a much more intense intellectual climate than those concerned with practical, professional tasks. What distinguishes the two is not the amount of raw intelligence employed or effort expended by either; rather it is the extent to which paradigms and values are made explicit, critically evaluated, and systematically reconstructed. Familiar analogies to the difference between physics and engineering or between biology and medicine should not be taken literally, but they are at least evocative.

The point will not be pursued further except in respect of two practical implications: Canada needs to create, as it were, a more hospitable microclimate for the cultivation of theoretical and empirical research on law, and on its social, economic and political significance; and the fruits of such "hot-house" research must gradually find their way into the marketplace of ideas within the domestic economy of the legal profession.

Second, there is the dimension of verticality, of height and depth. This manifests itself in the literature in a pervasive issue. Is law an independent or a dependent variable? Does it shape or is it shaped by its containing society? Indeed, can law and society be disaggregated in this way at all? At each parallel of latitude, across all degrees of longitude, these questions recur. The judge who claims that he must interpret a statute in a particular way to prevent the emergence of unwanted behaviour is adopting the position that law is an independent variable, that it has the capacity to shape conduct. The economist who argues that the common law tends toward either efficiency or the service of specific class interests assumes that law is a dependent variable. The social

historian who discerns how law functions as a legitimating device while at the same time imposing limits upon those whose interests are legitimated assumes an intermediate position.

Why is it important to assess this vertical dimension of legal writing? The vertical dimension is potentially of greatest significance in evaluating suggestions that a particular law has been, should be, or can be used instrumentally to transform, repress or stimulate social or economic behaviour.

For example, the assertion that the enactment of collective bargaining legislation in the 1940s promoted the rise of trade unions requires close examination. If law is seen as an independent variable, the statement implies that a decision was taken within the legislative branch of government which gave workers the right to organize; fortified by this new legal protection, they formed unions for the purpose of negotiating within the structures established by the new law. If we view law as a dependent variable, determined by the deep structure of economic relations, the same statement might carry quite a different message. Workers, we might be saying, were in fact already winning the "right" to bargain collectively by their own efforts prior to the enactment of legislation. Since law serves dominant interests — employers', not workers' — the legislation can be seen as an attempt not to improve the position of unions so much as to divert and contain their activities within limits and for purposes deemed acceptable to those who enacted the law.

Neither of these interpretations is unassailable, nor are modified versions of either likely to be. But they still serve to demonstrate the point that different theories about law's causes and effects may produce radically opposed interpretations of even relatively well-documented historical events. How much more is this likely to be true of statements about present and future developments in law and policy?

Finally, there is the dimension of texture. Is law "hard" or "soft"? Is it a positive fact whose existence is ascertained by the presence or absence of stipulated formal attributes; or is it a functional phenomenon, which can be detected by observing people's responses to it? For example, if we define law positively, as Austin did (and generations of English lawyers have since), it is the command of the sovereign; if we accept a more functional view, we can detect the presence of law even in the adherence of group members to group norms, which are neither proclaimed nor enforced by the state.

This dimension, too, is important in the present context, insofar as it reminds us of the multiplicity of non-formal legal systems which so often determine conduct within commercial networks, collective bargaining relationships, and government bureaucracies. And, of course, it reminds us of the need to explore the relationship between formal, state law and other legal systems.

Thus, a necessary concern with the topography of law, the third

dimension of our map, enormously complicates its use, while yielding important reminders of the distinctive characteristics of particular theories and assumptions. We must therefore ask whether, if it is useful to "map" legal studies, it would indeed be possible to do so.

Subject to certain reservations, and on the basis of an attempt made in connection with this study, the answer is "yes": typification is both desirable and possible. A substantial number of writings were examined in an effort, first, to locate them on our map and, second, to evaluate them in terms that might be instructive. This examination of writing derived from an internal, professional perspective (Appendix A) and from an external perspective (Appendix B) yielded several interesting, if tentative, observations.

Internal Perspective

1. Much of the most accessible legal writing (judgments, articles, law reform reports, etc.) assumes that law is more than rules; it tends to see law either instrumentally (law as a tool) or as the product of presumed social or political processes (law in context).
2. However, such writing by legal functionaries seldom involves systematic empiricism or deep theory.
3. Consequently, there is a special need to avoid taking at face value internally generated claims concerning the efficacy of legal tools (usually unverified) or the nature of the values advanced by, or the formative influences playing upon, law (usually ungrounded in any encompassing social theory).
4. One might expect (but again the point is not empirically verified) that law is more often viewed as "rules" in recurrent situations (standard transactions; routine litigation; bureaucratic processing; authoritative reference books).
5. Consequently, predictions about, and prescriptions for, the behaviour of legal functionaries should take account of the varying responses likely to be exhibited by individuals who occupy different professional roles.
6. While legal writing seldom makes overt references to ideology, such references are encountered from time to time, especially in the context of law reform or royal commission reports.
7. Such occasional references tend to mirror conventional political views, often involving tolerance (but seldom enthusiasm) for state intervention in economic life, but without articulation of a coherent ideology extending beyond the issues at hand.
8. Consequently, legal research will probably not make a useful contribution to the development of a coherent theory of the Canadian state, economy or society.

These general points, however, are subject to four important qualifications:

a. They speak to the general state of the art; research that is explicit and well grounded should not be undervalued just because it is "legal."
b. Empirical and theoretical work on law from an external perspective only may suffer from a lack of accuracy concerning formal legal rules or the legal-professional culture; the internal perspective on law is needed to inform the external.
c. General proposals for the use of law as an instrument of state intervention must ultimately be translated into particular legal forms; knowledge of the special language of the law is required to effect such translations.
d. Unexplored assumptions about law and its possibilities are also frequently encountered in writings by economists, political scientists, and others.

External (Theoretical/Empirical) Perspective

1. Research employing systematic empiricism or grounded in deep theory often directly challenges assumptions made in professional legal writing, e.g., that law is neutral, that law has the effects it is intended to have, that law is primarily administered by legal professionals in the context of formal legal institutions.
2. Such research tends to be more overtly dialectic, i.e., hypotheses are stated (or identified after the fact) and subjected to challenge or proof.
3. Explanatory theories, even when derived from careful empirical enquiry, do not seem to possess the comprehensiveness and verifiability of theories in the "hard sciences."
4. Consequently, theoretical and empirical research can best be used as a device to reveal and analyze the assumptions made in more conventional studies and proposals.
5. Ideological and value judgments are sometimes buried in "scientific" and positivist analysis in the social sciences; the exposure of these buried judgments is an important step in evaluating research and policy proposals based on research.
6. Overt and structured debate over ideological issues is regarded as a permissible form of intellectual discourse (as it typically is not in much legal research).
7. Consequently, it should be possible to achieve some consistency or coherence in public policies based on theoretical and empirical research: sufficient ideological distance exists amongst "deep theorists," especially, to provide policy makers with a choice amongst genuine alternatives, and to link like policies with like, rather than to pursue disparate policies under an all-purpose, pluralist philosophy which actually embraces contradictory and mutually limiting tendencies.

These general observations are capable of being misinterpreted in one important respect. To clarify: they do not constitute a plea for a single ideological and intellectual approach to research itself: only for careful identification and assessment of the approaches selected.

The need for a plurality of research approaches, and for a dialectic amongst them, may seem a little odd in the context of an overall scheme of inquiry which has as its ultimate object the definition of new national goals, and the creation of a consensus about how best to attain them. But to be frank, such enterprises are particularly vulnerable to the allure of conventional wisdom which, by definition, already enjoys considerable and widespread support.

Nonetheless, the prospects for even incremental change would be enhanced through a consideration of the true range of options for Canada. If we are concerned about the future of collective bargaining, for example, its virtues and vices can be brought more clearly into focus by considering the diametric opposites of uninhibited, unilateral employer control, and full-blooded, ongoing state regulation of the labour market. If we are frustrated by our apparent inability to eliminate sulphur emissions, is our imagination not stimulated by considering such radical alternatives as the sale of pollution rights on the one hand, and the expropriation and shutting down of polluting factories on the other?

In much the same way, the prospects for a less conventional and more truly wise "conventional wisdom" are enhanced by shifting our usual intellectual point of view. For example, we might understand much more clearly, and use more appropriately, the equality provisions of the Charter if we were more familiar with their philosophical forebears and less dependent on legal precedent. Or we might spare ourselves futile future attempts to use the criminal law as our preferred first-line regulatory device if we systematically monitored its present use in areas where structural factors largely determine behaviour.

Those of us who evaluate research, then, have a responsibility, and those who undertake research a challenge: to expand our frames of reference, alter our paradigms, vary our techniques, assumptions and theories, in order to make more critical and self-critical evaluations of research and policy proposals based on research.

How Law Functions: A Dynamic Model of the Regulatory Process

We have sought to demonstrate the need for more explicit understandings about what law generally is and does. Our next task is to try to construct a working model that will help us to examine the processes by which it actually functions as an instrument of state intervention. This exercise is intended to serve as an aid to the interpretation, evaluation

and application of the work of others, rather than as a ground-breaking ceremony for the construction of a new meta-theory. It is therefore desirable that such a model accommodate the greatest number of the assumptions and theories we have already identified.

Many of these assumptions and theories focus upon particular stages of the relationship between law and social and economic behaviour. For example, Marxist theory emphasizes the influence of social and economic relationships, at the deepest level, upon the overall direction and general effect of a legal system; but it says relatively little (except in its crudest and most deterministic expression) about the precise formulation of particular legal rules, or the outcome of specific legal events. Legal professionals may, by contrast, be able to draw upon their own understanding of law in order to state the content of a particular legal rule as it stands at any given moment in its development, or to predict reasonably accurately the outcome of a routine transaction or dispute; but they seldom address the social context or general significance of either the rule or the legal event.

These limitations in perspective are not confined to Marxist theorists or legal professionals. Few systematic empiricists or law reformers or other contributors to debates concerning the nature of law purport to offer a totalizing theory which encompasses all causes and effects, all data and speculation, all levels of specificity and generality. This is no criticism, however. Each may indeed be highly pertinent to our understanding of a given stage in the process of state intervention.

This mention of "process" reminds us, as well, that we must turn our hand to the construction of a dynamic model that differs from, but can nonetheless accommodate, the various sets of assumptions we have already identified. It is precisely because state intervention is a process — not simple but highly complex, not static but changing, not universal but multiform — that only a dynamic model will be able to accommodate its various aspects. Without imposing itself upon the reality of any given event, without challenging the explanatory power of any given theory or invalidating the claims of any given assumptions, such a model will yet remind us that there is always something that has gone before and something that will come afterwards.

The extent to which any process model can capture the full range of events and influences that determine how a given law functions is limited only by our willingness to etch in the detail, to attach new moving parts to the basic framework. However, for purposes of the present exercise, the aim is not so much comprehensiveness as a demonstration that the workings of law, its causes and effects, are more complex than is often assumed.

This demonstration will be undertaken with particular reference to the regulatory process. It is possible to regard all forms of state intervention as regulatory in some sense. Tax incentives, government procurement

policies, criminal prosecution for misleading advertising, injunctions to restrain picketing, the granting of patents of invention, and multinational economic agreements all regulate. That is to say, they all stipulate (whether by admonition, prohibition, or mere silence) that a particular course of conduct should adhere to policies determined or acquiesced in by the state. Indeed, even the state's failure to articulate any policy or to pursue it through regulation is a form of intervention in itself; the state is then opting to support processes of spontaneous ordering. To this extent, the typical modern regulatory statute, which defines policies and establishes ongoing administrative instrumentalities to achieve them, is not essentially different from other forms of state intervention.

Not essentially different, but somewhat different. Contemporary statutes regulating air safety, milk marketing, or discrimination in employment exhibit distinctive characteristics which have emerged over 150 years, since such legislation was first enacted in England. These characteristics (canvassed more thoroughly in the final section of this study) are: explicit limitations on, or displacement of, personal or corporate autonomy in order to advance the individual or collective interests of other actors; overt reliance on the purposeful use of legal rules to accomplish this end; and enpowerment of a bureaucratic agent which can use the rules to secure the ends defined (however vaguely) by the statute. This is the paradigmatic regulatory statute, whose creation and operation will be examined in this section.

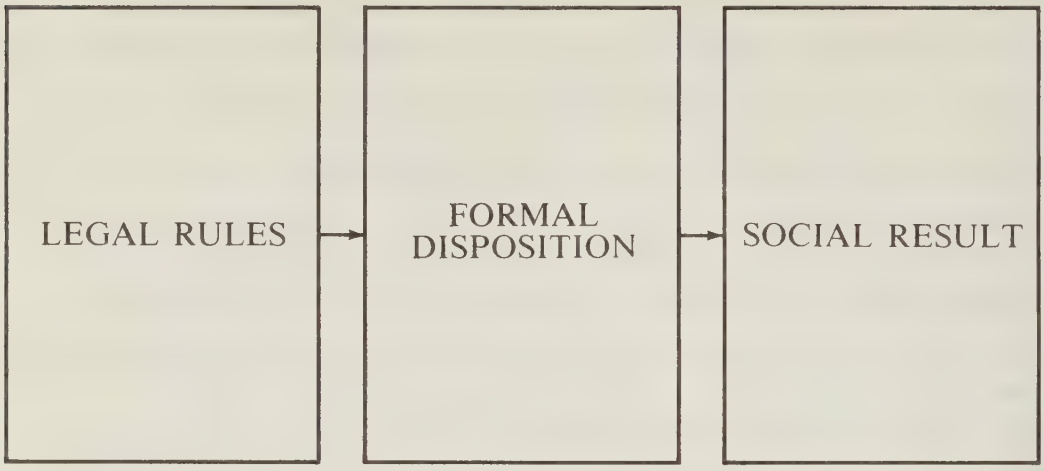
Since both the form and the substance of regulation in this paradigmatic form are the subjects of ongoing controversy, an analysis of how the regulatory process works should illuminate specific aspects of an ongoing policy debate over the state's role in the marketplace. At the same time, it should also throw some light on the creation and operation of law in other forms and contexts: "mega-regulation" through the Charter of Rights and Freedoms, domestic regulatory regimes such as press councils or professional disciplinary bodies, or such conventional settings as road traffic, debt collection, and family disputes.

Let us now see what can be learned from an attempt to see the regulatory process whole.

It will be recalled that a good deal of legal-professional thought proceeds on the assumption that law is indeed a body of rules, which can be used instrumentally (as a tool) to alter behaviour, essentially with a one-to-one ratio between legal command and social result. This view can be portrayed by a relatively simple diagram, illustrating how a regulatory statute actually operates (Figure 2-3).

However, if we accept that law is a complex system of elements interacting with each other and with external influences, as is suggested by many of the theories and the understandings identified in the preceding section of this study, we must attempt to construct a much more complex model. One such model is offered next, in Figure 2-4.

FIGURE 2-3 Legal-Professional Paradigm of the Operation of Regulatory Statutes



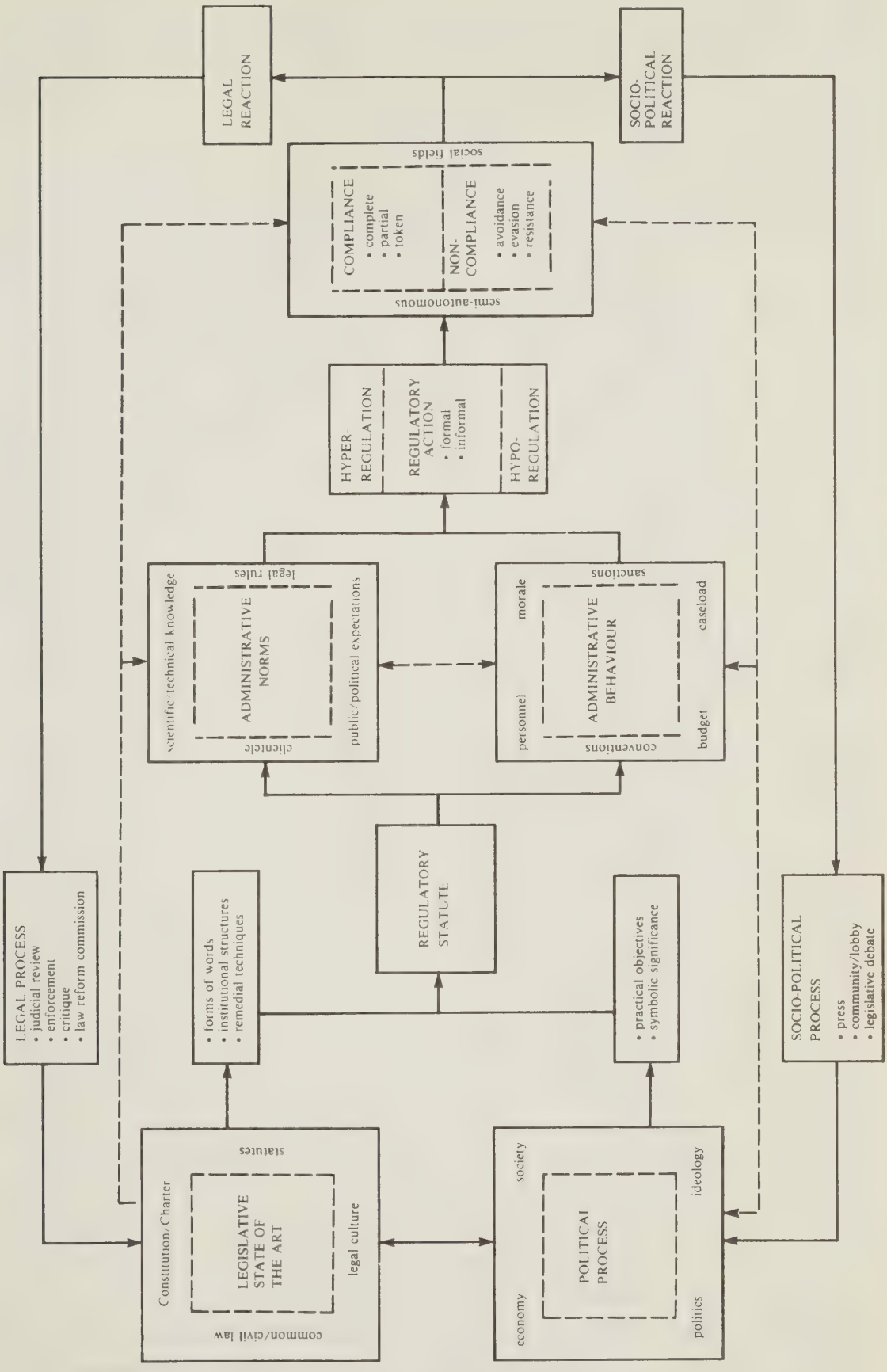
What are the hypotheses expressed by this more complex process model? We may begin by postulating that the legal and social, political, and economic systems in a society interact with each other. On the one hand, even those who believe that law is a dependent variable, a product of the deep structures of social and economic life expressed through the organs of the state, may well concede that at some point the constitutive power of those structures is attenuated, and the formal legal institutions themselves do define "the state of the art" of legislation and lend shape and definition to particular statutes. On the other hand, those who see law as an independent variable will perhaps accept that it partakes of and contributes to general assumptions about what should be done by way of social policy, and how. The very doctrine of legislative supremacy emphasizes that law is ultimately the outcome of the political process, which must be permitted to prevail over the internally generated norms of common law.

Thus we can say, in a general way, that when a regulatory statute is enacted, the political process produces a decision that the state should intervene in some field of economic or social behaviour, and that the legal system contributes a vocabulary of conventional forms to give expression to that decision.

However, regulatory statutes — statutes of any description — are not self-executing. They require instruments of effectuation: inspectors, police and other officials charged with promoting compliance and identifying violations, and courts or administrative tribunals which authoritatively interpret the statute, order conformity to its provisions, grant or withhold benefits, sanction or refrain from sanctioning offenders.

And these effectuation and adjudication functions are only the tip of the iceberg. Regulatory regimes frequently engage in the massive generation of "law" through the development of subordinate legislation,

FIGURE 2-4 A Dynamic Model of the Regulatory Process



interpretation bulletins, directives, patterned responses to typical situations and otherwise. This "law" will not deliberately transgress outer limits defined by the regime's original empowering statute or consciously violate constitutional or other legal norms, such as accepted canons of construction. But its distinctive form and content will derive from sources that are largely indigenous, rather than external, to the regime itself.

Where, more precisely, will this distinctive form and content originate? Regulatory regimes often engage in research and planning, and policy formulation. In some cases, no doubt, research and planning are abandoned after the early days of the regime, or eschewed in favour of a more pragmatic, flexible or merely reactive posture. But policy formulation is inescapable. Every decision to act or not to act calls up the ghost of a policy past, present or future, whether the ghost materializes or not. Moreover, regulatory regimes often engage in ongoing and extensive discussions with their "clients" (those whom, or on whose behalf, they regulate), seeking scientific or technical information, agreed interpretations, voluntary compliance, and views or suggestions concerning the effectiveness of old policies and the possible content of new ones. When they do not do so overtly, they may yet receive feedback via client protests, public criticism, or political, technocratic, or scientific surveillance.

All these processes yield a unique universe of substantive and procedural administrative norms; yet these norms do not automatically translate into administrative behaviour. They are, to a considerable degree, mediated by bureaucratic resources, values and interests. These may include the extent and quality of available staff, the range of available formal and informal sanctions, deference to accepted conventions of internal and external accountability and responsibility, the avoidance (if possible) of adverse legal or political reactions to administrative initiatives, and professional pride in accomplishing the ostensible or tacit objectives of the regime.

Thus, regulatory statutes typically generate both administrative behaviour and administrative (as distinct from statutory) norms. Both in turn are influenced by, and influence, behaviour and norms emanating from other sources. Thus, it is the convergence of administrative and non-administrative behaviour and norms that in the end produces regulatory action affecting individual situations.

However, we must now confront several additional assumptions: that each such instance of regulatory action is explicitly mandated or implicitly encompassed by the spirit or letter of an enabling statute; that each is the subject of a formal decision, order or other disposition; and that each produces conforming conduct of the type contemplated by the statute. All these assumptions are questionable.

On occasion, we may witness what might be called "hyper-regulation."

In effect, a regulatory regime may overreach its mandate and seek to impose itself on conduct or persons at which it was not initially directed. This phenomenon could result from a careless misreading of the governing statute but is as likely to be a response to some unusual social, political or bureaucratic stimulus. A new and unforeseen danger appears, or a radical shift occurs in public demand for control of a long-persisting problem, and an existing regulatory regime is called upon to make a speedy response, as the only device the government has to hand. Or, as the result of some bureaucratic imperative, including zeal for the public welfare, a regulatory regime decides to embark upon unfamiliar, and unauthorized, ventures.

More familiar than hyper-regulation, however, is its opposite: hypo-regulation. This may result from administrative timidity, sloth, ineptitude or capture, or again from a misunderstanding of what a governing statute permits or requires. But these are not likely situations. Almost always, regulators operate in an internal economy of scarcity: they lack the staff, powers, knowledge, or public support to ensure perfect and perpetual compliance with regulatory objectives and standards. Confronted with the impossibility of securing compliance in all cases, they may opt to address only egregious violations, important cases, test cases whose outcomes may clarify dubious interpretations or be regarded as typical of an entire class of cases, uncontroversial and innocuous cases, randomly selected cases which fortuitously come to their attention, or none at all.

When cases are addressed, moreover, they may be dealt with in ways other than by protracted, resource-consuming, and not necessarily effective formal proceedings. Rather, they may be dealt with informally, so that total or partial compliance may be achieved through threat, admonition, persuasion, negotiation or even benign neglect.

Yet the use of the terms "hypo" and "hyper" implies that it may be possible to say when regulation may be neither of these but, like Goldilocks' porridge, "just right." Such a notion is misleading. Since there is no practical possibility of foreseeing all regulatory contingencies, or addressing them in clear language, the judgment as to whether regulation is too much or too little or "just right" is very much a matter of political perspective and personal interest.

However, for analytical purposes, we may assume that regulation sometimes operates as it was meant to, and as contemplated by the model that is often projected upon regulatory regimes by legal draftsmen and advisors, professional presiding officers, or reviewing courts. The statutory standard is applied directly, with a minimum of administrative distortion, in a formal proceeding whose outcome is a dispositive decision or order. But it does not necessarily follow that decisions or orders will be automatically obeyed or coercively enforced.

Even after formal proceedings are launched, even after they have run

their course, there are sometimes slips 'twixt the tongue of enforcement and the lip of compliance. What causes these slips? A range of possibilities may be conjured up: poorly drafted decisions or orders; fast-moving events which render outcomes moot; procedural or evidentiary obstacles to proving non-compliance; the moving party's calculations or miscalculations of strategic advantage or tactical gain leading to the quiet abandonment of formal efforts to secure compliance; intransigent resistance, sometimes nurtured by the incomprehension or antipathy of some other decision-making body; or an ultimate failure of will by the regulatory regime itself.

Finally, neither the emergence of administrative norms or behaviour nor regulatory action or inaction, nor partial, total or non-compliance, produces consequences only within the specific regulatory context. Each may trigger external reactions by way of appeals to higher administrative or legal authorities, or through socio-political channels. Such reactions may, in turn, generate new law, infuse old law with new force and meaning, or lead to its amendment or repeal. With this effect noted, we find ourselves returning to our point of departure, at the first stages of our dynamic model (Figure 2-4).

At the outset of this section, the suggestion was made that such a model should, and could, accommodate a large number (if not all) of the assumptions and theories identified in the previous section. We must now return briefly to this suggestion. Within the dynamic model proposed in Figure 2-4 there are obvious points at which different levels of legal analysis can be profitably employed.

For example, the model as a whole, and particularly that part of it which seeks to describe the relationship between the political process and the legislative process is the frequent subject of what we earlier referred to as "deep theory." Critical legal scholars, Marxists, and sociologists of jurisprudence (see Appendix B) all treat this relationship as a central focus of study.

To take another example, systematic empiricism can do much to validate or falsify assumptions about what happens at other points in the process at particular moments by examining, for instance, what are characteristic determinants of bureaucratic behaviour, what contingencies influence choices between formal and informal compliance strategies, and what is the incidence and outcome of appeals. Accepting that empiricism is itself contingent (rooted in deep epistemological theory and susceptible to ideological or normative influence), we can still see how careful and candid evaluation of actual proximate causes and effects can contribute much to the improvement or amendment of our model. It can also help to sharpen practical judgments about legislative design, the allocation of scarce administrative resources, or the probability of regulatory success or failure in given situations.

Turning to perspectives associated with legal functionaries, sen-

sitivity to the general notion that law exists in context, that it responds to external stimuli, is probably the hallmark of successful regulatory strategists. If, like politics, regulation is to be regarded as the art of the possible, those who are well informed and aware of the contingency of all action are likely to avoid some errors and be spared a degree of frustration. However, their contextual sensitivity may turn out to be no more than a vague or even unwitting blend of the lessons of deep theory and empiricism. As earlier proposed, they are therefore exposed to the risks of fundamental misconception, imperfect understanding, or response to contradictory influences. Immersion in a dialectic between (or amongst) theory, empiricism and praxis does offer some safeguards and correctives, and their tacit knowledge and willingness to learn the lessons of experience will often win through in the end.

Posted as they often are at critical junctures in the regulatory process (as senior officials, policy advisors, academic critics, advocates for major interest groups, and chairmen of leading boards and commissions), those who are aware of law in context are often responsible for important strategic decisions that determine which policy will be adopted at various stages of the regulatory process.

Those who view law as a tool have a yet more circumscribed view, a tactical rather than a strategic view, which reflects their own function in the regulatory process. In effect, these are people who know how to get things done; when to pursue formal, and when informal, processes; how to gain tactical advantage or leverage through the assertion of procedural rights or the use of political influence; what type of arguments will prevail in a given context; and when it is wise to ignore law altogether and rely upon self-help, economic incentives, or other devices. They are, in short, knowledgeable about law but not mesmerized by it, technically competent but with an ultimate commitment not so much to understanding as to a particular outcome in a particular situation.

These characteristics, which are associated with those who view law as a tool, are typical of effective lawyers and bureaucrats. As they rise, through the successful application of this talent, to more senior positions (e.g., judge, tribunal member, or head of a branch or bureau) they may be called upon to shift from tactical to strategic tasks, from individual instances to generalities. Some do so successfully and some do not. Yet even as they use their legal "tools," they are leaving an impression upon events, and thus contributing ultimately to the dynamic of the regulatory process.

The use of law as a tool may indeed be invaluable at crucial moments to advance the cause of either those who regulate or those who are being regulated. However, those who possess the ability to use it possess only a bounded form of knowledge, and herein lies a serious problem. Precisely because such individuals are the skilled craftsmen of the regulatory process, precisely because they can justly claim credit for indi-

vidual outcomes, they are looked to for advice about the regulatory regime as a whole, and their advice tends to be accorded considerable weight. But because their knowledge is bounded by the demands of their work and by its often partisan nature, their opinions tend to lack a full sense of context, let alone of deeper ideological, theoretical, and empirical insights which can be so helpful to well-informed decision making.

Finally, we may look briefly at those for whom law is "rule." They too are indispensable to the functioning of a regulatory regime, and have important insights to contribute to our model.

It is characteristic of any bureaucratic organization, public or private, that discretionary decisions are reserved for those who occupy positions at higher levels of authority. First-line decision making tends to be relatively stereotyped, especially where large numbers of decisions must be made, and where consistency is sought. Whether the governing statute or regulations provide detailed categories or whether, more likely, these are defined in manuals or simply learned through repetition, the task of the first-line decision maker is to identify a problem as belonging to a defined category, and to treat it in a predetermined manner. Anomalous problems may be set aside for special treatment; errors of classification may be weeded out in the course of subsequent audit or review; aggrieved individuals may have a right of challenge or reconsideration. But the "law" of the regulatory regime is indeed intended to be the rule.

An intimate knowledge of, and effortless capacity to apply, the rules will therefore be the stock-in-trade of the regulator at this level. But, of course, these very attributes are also the means by which he can avoid the intention and distort the application of the regulatory regime. An intimate knowledge of the rules will reveal gaps and contradictions, and provide a "legal" means of escape from seemingly inevitable consequences. Effortless application will fortify the impression of inevitability, mask what may be negligent error or deliberate distortion, or simply intimidate. And because many minor regulatory regimes touch the lives of ordinary people precisely at this level, it is no wonder that they are particularly vulnerable to hyper- or hypo-regulation. The elimination or confining of discretion, then, which is so often high on agendas of regulatory reform, may in fact contribute not to better but to worse administration.

Thus far we have mentioned only how various intellectual perspectives can be, and likely are, brought to play upon, and provide insights about, various aspects of our process model. It hardly needs saying that the model is likewise susceptible to ideological critique: indeed the attribution of significance to behaviour and outcomes at each state in the process is an ideological critique in itself. Are the "rights" of those being regulated fairly protected? Does the process unduly encumber entrepre-

neurial activity? Is public reaction to regulation affected by the structure of ownership of the media? Such questions proceed from explicitly political premises.

To summarize: different views about law as an instrument of state intervention have now been identified, and attributed to various ideal types. A dynamic model of the regulatory process has been proposed, and populated with these ideal types. The insights about law which are associated with various ideal types, it has been suggested, can be used to shed light upon the processes incorporated in the dynamic model of regulation. It remains only to reiterate an earlier point. These ideal types are not necessarily real people. While the attitudes are characteristic of individuals who perform a given function, they are not necessarily found in any particular individual in any particular degree. But the use of ideal types at least reminds us that as regulation itself is complex, changing and multiform, so is the nature of our knowledge about it, linked as it is to particular perspectives and foci of attention or activity.

Form, Function and Context

In constructing a process model of regulation, we took as the basis of our analysis the typical regulatory statute, which has as its forebears the *Factories Act* of 1833, and the host of mid-Victorian interventionist statutes that followed in its wake. It is now necessary to retrace our steps in order to attempt to explain why regulatory legislation became, and has remained, such an important technique of intervention in the modern, democratic state. In embarking upon this enquiry, we will not address the questions of whether the state should intervene at all or, if so, to what end. Rather, we will assume that the political process yields a decision that the state should act to achieve certain objectives; it must then decide by what means it will do so.

There are three aspects to this enquiry. First, we must ask why "law" itself is used, in preference to other interventionist strategies. Second, we must try to understand what special features of regulatory legislation make it more appropriate than other legal forms for such intervention. Finally, we will briefly explore how the legal, social and political context of such legislation may operate as a limiting or distorting factor in the realization of regulatory objectives.

To turn to the first issue: why "law"? Governments, in principle, may choose amongst a wide range of policy instruments. While some of these may be mandated or ultimately given effect by law, they need not involve the ongoing instrumental use of "legal" adjudicative or regulatory mechanisms, although these may be called in aid at occasional moments. Examples of such instruments include direct or indirect public fiscal and financial strategies such as participation, controls, incentives or disincentives (e.g., public expenditure and borrowing, state ownership,

contracts, loans, subsidies, tax rates or concessions or penalties); exhortation or education (e.g., information campaigns to discourage smoking or promote energy conservation; awards for bravery or research; the dissemination of knowledge about sex and birth control); exemplary behaviour (e.g., recruitment and promotion of minority group members in the public service; non-statutory expenditure restraints; conformity to personal morality and ritual-symbolic observances); negotiation (e.g., intergovernmental coordination and cooperation, collective bargaining, settlement of native land claims).

The suggestion that these important policy instruments do not involve law is, of course, not to be taken too literally. The distinction between "legal" and "non-legal" instruments is only relative. Many of these measures are obviously legal, at least in the sense that they are authorized by statute or common law, or require formal legal approval before becoming effective. Many of them, as well, generate "law" such as detailed agreements, manuals, customs or conventions, which operate normatively to determine government or private sector conduct in the future. Thus, to label them as "non-legal" is merely to say that they lack some of the characteristics of "law" as it is expressed in the Criminal Code, common law doctrine, or the typical regulatory statute depicted in Figure 2-4.

Nevertheless there is a difference between using law and not doing so: to keep down public sector wage levels through tough collective bargaining is not the same as restraining them through legislation; to reallocate governmental responsibilities through constitutional amendment is not the same as doing so through federal-provincial negotiation; to ban or regulate the sale of alcohol or drugs is not the same as inveighing against their use, or selling them exclusively through state outlets.

This much understood, what criteria might be used to decide whether to adopt one or more of such "non-legal" measures, alone or in combination with "law"? Such criteria are difficult to articulate. However, they generally relate to three factors: (a) judgments about the relative efficacy of legal and "non-legal" measures in particular circumstances, (b) a calculation of the political and other costs of resort or non-resort to law, and (c) convictions about the special legitimacy of law as an instrument of policy. It is possible to make only very general observations about the first two of these factors in the abstract, and apart from context. However, the third transcends context, and deserves somewhat fuller scrutiny.

As to efficacy (whether the chosen instrument will accomplish the desired results) governments may consider whether they are dealing with individual instances of deviance, with characteristic, widespread behaviour, or with structural factors; whether sticks or carrots are more likely to produce desired results, or indeed whether any "results" at all are desired, other than that government should be seen to be doing

something; and whether its response should be short-term, flexible and easily recast or long-term, predictable and relatively immune from amendment. Efficacy is a judgment derived, not from the laws of physics, but from informed political and administrative intuition.

The exercise of this intuition necessarily involves the second factor, an assessment of what it will cost a government to get what it wants. Financial costs may be projected: subsidies, administrative or judicial salaries, increased costs of production, or diminished consumer expenditures. But costs must also be reckoned in non-monetary terms. Will the adoption of a particular interventionist instrument win or lose political support for the government, undermine or enhance the attainment of other policy objectives, or set in motion unpredictable events whose possible outcomes seem dangerous?

The answers to such questions may lead to the adoption of complicated strategies of intervention such as the National Energy Program, job creation schemes based on tax incentives, or a political campaign to curb government expenditures and private sector wages. They may generate intervention that is purely verbal: stern warnings, exhortation, promises of a better future. Or they may generate what has been labelled a "legal" response, again understanding that term in its relative sense.

When, then, will intervention take the form of law, a statute that contemplates the use of a court, board or department to adjudicate or otherwise dispose authoritatively of individual instances, to lay down norms of behaviour, or to stipulate and impose the consequences of misbehaviour? To understand when law is likely to be used in this way, we must pass beyond a purely instrumental calculation to an understanding of law's function as ideology.

On the one hand, the "rule of law" is deeply embedded in our political culture. If controversy arises over state intervention, it may be important to both attackers and defenders to be able to reinforce (or appear to reinforce) their position by appeals to the rule of law. If it can be shown that conventional procedures and institutional arrangements have been used to produce a valid "law," those who support it can insist that even its opponents must obey it. While the wisdom of the law is always open to debate, its legitimacy (its power to elicit or compel obedience) is not. Conversely, attempts to require conformity to public purposes not formally embodied in a law may be perceived to lack legitimacy. They may be impugned as an affront to parliamentary democracy, as bureaucratic imposition, as corporatist or totalitarian. The very absence of clear legislative root of title for state intervention provides its opponents with another basis of criticism, over and above that directed at the merits of the policy.

In political discourse, then, the "rule of law" has significance to the extent that procedures and institutions are not themselves in contention: only if they are agreed, only if they are seen as essentially neutral, can

they exercise closure on debate. For this very reason, proponents or opponents of state intervention may seek to appropriate or redefine the meaning of the rule of law, a meaning which indeed has changed historically and is indeterminate at any given moment. It is in this sense that we must understand attempts to claim that capital punishment is unconstitutional, that strikes are protected as the exercise of freedom of association, that commercial advertising is freedom of speech, or that the environment should be guaranteed protection by an amendment to the Charter.

This process of redefining the rule of law does not occur only through explicit adoption of new fundamental norms, e.g., the Charter, or of minimum procedural guarantees in administrative proceedings. It may also derive from ongoing and inexplicit processes of textual interpretation, or grandiose proposals to secure the transformation of our political consciousness and culture. In this context, however, the important point is that the rule of law is more than a non-controversial standard by which debate may be judged; its content and implications are themselves the subjects of ongoing debate.

On the other hand, while the rule of law in general may on close analysis be seen to lack the objectivity and neutrality often assigned to it in our political culture, it has a special added significance for lawyers. For them, it is both a term of art and an ideological premise. As a term of art, it connotes a Diceyan, quasi-constitutional insistence upon formal adjudication in (or under the control of) the superior courts, in preference to all other forms of public decision making. As ideology, it emphasizes the resulting central role of legal professionals in the affairs of the state, and thus provides a justification for the autonomy and other advantages claimed by the bar. Departures from formal adjudication in the direction of measures mentioned earlier — even, as we shall see, in the direction of adjudication in forums other than superior courts — may therefore be vulnerable to legal attack on constitutional or other grounds. At the least, they are liable to be stigmatized by professional spokesmen as violations of the rule of law, thus undermining public perceptions of their legitimacy.

Thus, we have at least partially answered the first question posed. Law may be chosen in preference to other interventionist strategies because apart from, even in spite of, considerations of efficacy and cost, it may avoid or narrow controversy over the legitimacy of state action. At the same time, the use of law has the further incidental advantage of attracting the support, or at least muting the hostility, of a strategic elite, the legal profession, with whose interests and ideology it is closely intertwined.

En route to the second question (why regulatory legislation is so often selected by governments as the preferred expression of law) we must revisit the discussion we have just left.

"Law," as we have seen, is not a self-defining term. Its general significance as a body of rules or as a behavioural phenomenon, as the cause or effect of socio-economic forces, as a moral imperative or as a state of consciousness, is a matter of considerable controversy. To this controversy must now be added a further element: differing formal and institutional expressions of law elicit different professional and political responses. Some hint of these differences resides in the earlier allusion to Dicey's "rule of law," which has been so much a part of our political and legal culture. Amplification of this allusion will be the next stage in the development of our analysis.

When lawyers speak of the "rule of law," they tend to presume: that legal rules are pronounced authoritatively only by legislators or (in the common law) by judges; that those rules will form part of the "ordinary" law applicable to all citizens; that the rules are sufficiently precise that they eliminate (or greatly reduce) the discretion of officials charged with enforcing the law, and provide sure guidance for those who must comply with it; that violation of the law will result in predictable consequences; that decisions as to both violations and consequences will be made in proceedings in the "ordinary," i.e., superior, courts; and that the adjectival rules governing such proceedings will also be "ordinary," i.e., that they will conform to those generally used in civil or criminal causes. This model of law we may describe as formal-adjudicative.

So successful have lawyers been in setting the terms of debate over legal procedures and institutions, however, that they have indeed managed to equate their preferred formal-adjudicative model with the notion of the rule of law itself. Other possible visions of the rule of law might have stressed community participation, the quality of substantive outcomes, or a rich plurality of institutional forms. Yet all of these tend to be regarded (especially by lawyers) as illicit or deviant, as does the bureaucratic or administrative model, which is characteristic of regulatory legislation.

A century ago, Dicey drew a firm line between administrative law and the formal-adjudicative model of "ordinary" law. The two continue to be regarded as antithetical by many contemporary observers. Today, even those who reluctantly acknowledge the descriptive weaknesses of Dicey's model continue to subscribe to it as an ideal to be accomplished, while those who can contemplate administrative law without dismay are sometimes tempted to prescribe adoption of formal-adjudicative elements as a corrective for administrative malfunction. How different, then, is the administrative model, as it has emerged in typical regulatory and social legislation over the past 100 or 150 years?

The administrative model (whose regulatory subspecies we have already examined) may be seen to have these characteristics: ongoing and active responsibility for achieving legislative objectives is confided in ministries, boards and officials; legal rules emanate from these admin-

istrative sources in the form of subordinate and quasi-legislation, circulars, manuals, decisions and patterned behaviour, albeit within a statutory framework and subject to encompassing constitutional and legal principles; these rules are context-specific, and aimed at particular audiences rather than at society as a whole; legislation authorizing administrative behaviour is typically open-textured, contemplating the exercise of considerable discretion at senior levels, often as a post hoc response to previously unknown or unregulated behaviour; findings of violation and their consequences may be unpredictable because they are part of an ongoing process in which the effectuation of general policies is accomplished through a mixture of admonition, negotiation and sanctions; formal determinations of violations and penalties are made in specialized, sometimes expert, tribunals; and those tribunals operate with the assistance of staff, but without regard to formal rules of evidence, pleadings or other curial characteristics including, frequently, the adversary system itself.

In reality, the opposition between these two quite different ideal types is likely to be considerably less than theoretical consideration might suggest. For example, if one were to examine the criminal justice system as it operates in fact, it could be seen as largely conforming to the administrative model. And if one were to isolate a given body of administrative law, administered by an administrative tribunal, such as a labour relations board, both would be seen to possess many functional elements that closely resemble those of the formal-adjudicative model. Thus, we can say that a range or spectrum of possibilities exists, incorporating aspects of each of the two models. Which of them, however, is likely to predominate in any given situation?

Even a casual reading of the socio-historical evidence shows that the rule-of-law, formal-adjudicative model and the administrative model were from the outset associated with quite different attitudes toward state intervention in social life and economic activity. The rule-of-law model, as Dicey, Atiyah and others have asserted, was indeed the instrument of 19th century anti-interventionist attitudes. The administrative model developed by trial and error as a reaction to those attitudes, as new objectives of social welfare and economic regulation proved unattainable without the adoption of new legal techniques which represented apparent departures from the formal-adjudicative model.

Today the administrative model still tends to be associated with an interventionist impulse, and the rule-of-law model with that of laissez faire, although we have come to understand that neither impulse will necessarily attract the same adherents across time and the entire range of economic and socio-political issues. For example, film censorship via the administrative model seems particularly intrusive, and might kindle the ire of some who favour the use of that very model to control commercial advertising. Some who strive to reduce industrial injuries

and accidents urge that administrative health and safety regimes have proved to be ineffective, and should be replaced by traditional rule-of-law criminal prosecutions and tort actions. Others who see no point in routine judicial processing of undefended divorces, automobile accident claims, and driving offences favour their consignment to administrative processes.

These positions might be thought to lend weight to the argument that the linkage of political objectives and institutional forms was adventitious, a mere historical accident, now being revealed as such by the rediscovery of the rule-of-law model by those who formerly spurned it, and of the administrative model by its erstwhile opponents. But this argument gives away too much to evidence of short-term tactics and expedient judgments; at least it ignores what the historical evidence seems to signify.

Today, as from its inception, the administrative model appeals because it seems to offer better prospects of positive results in dealing with complex, dynamic, and context-specific situations, or with those which must be confronted in large numbers and recurring patterns. It seems indeed to mirror the "scientific," rational and bureaucratic characteristics of the complex corporate structures it so often confronts, with no doubt similar strengths and weaknesses.

Where disenchantment with the administrative model has set in, because of its failure to deliver what was promised, alternatives are naturally sought. This should not obscure the fact that the administrative model originally developed in opposition to the formal-adjudicative model which seemed so incapable, not to say unwilling, a vehicle for regulatory intervention. Nor should it make us hesitant to predict that the latter model may well disappoint once again, and that health and safety advocates, for example, will ultimately rediscover the discrete charms of the bureaucracy. Conversely, even such committed advocates of the rule of law as superior court judges may come to perceive that their own interests lie in conserving scarce judicial resources for more controversial, challenging and prestigious work, and to conclude that the administrative model is the answer when efficiency is the problem.

To come, finally, to the political point: it is entirely understandable, on both historical and functional grounds, that those who want the state to intrude into the domain of private action should opt for the administrative model as the most effective method of intrusion, while those who are resisting regulation should oppose it for that very reason. In law, then, as in architecture, form has come to follow function. The converse holds true as well: a desire to inhibit function leads to hostility to the form.

Let us now try to see whether (and, if so, how) the administrative model may advance, and the rule-of-law formal-adjudicative model may inhibit, state intervention. Several familiar examples make the point.

Consider, for example, the issue of legislative specificity versus

discretion-creating, open-textured statutory language. In many circumstances, legislative specificity is impossible because the very nature of the problem (let alone of possible responses) is understood dimly or not at all when the statute is enacted. In effect, a new administrative agency is created to study a problem while simultaneously attempting to deal with it, in the expectation that through a dialectic process new understandings will emerge from, and be used to reformulate, strategies of intervention. In the same vein, administrative agencies will be left with discretion because the problem is one involving rapidly changing events, technological or scientific innovation, or other fluid facts which specific legislative language could neither contain nor be revised quickly enough to recapture.

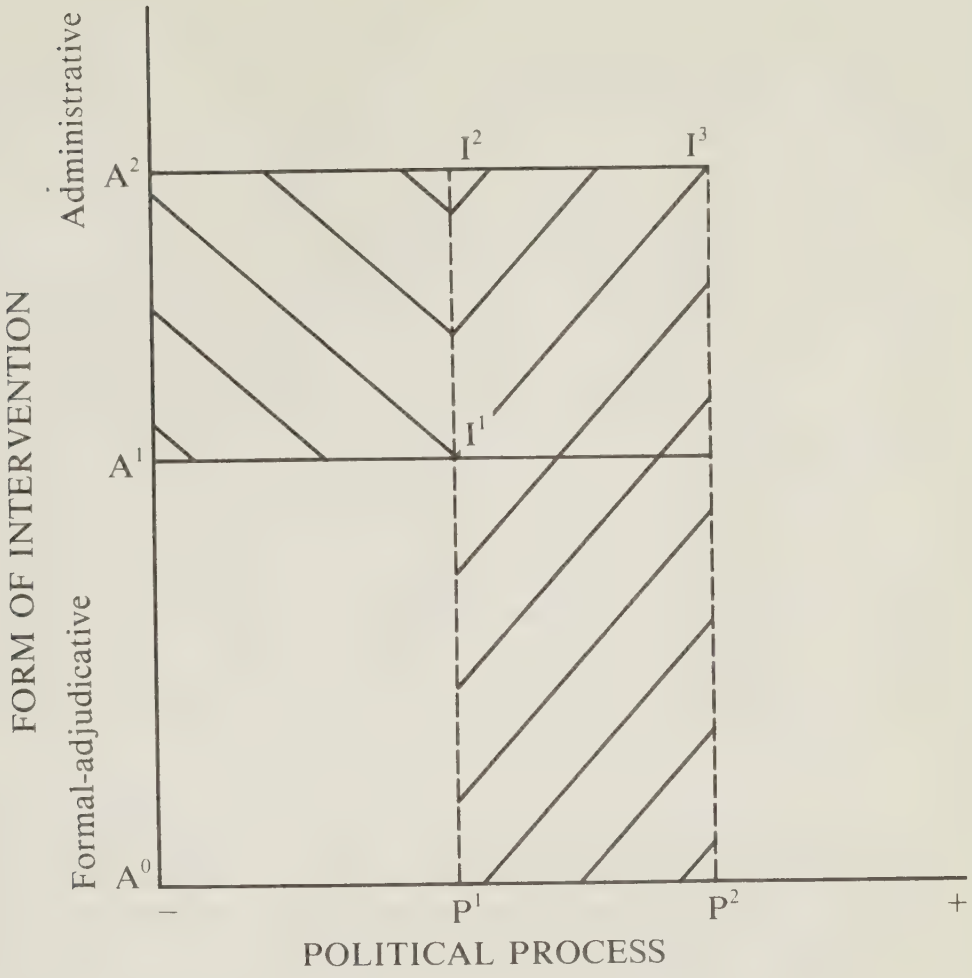
Consider the question of conventional adjectival rules. Procedures designed to deal with individual controversies, at retail, may be overwhelmed when used to deal with them in large numbers, at wholesale. Evidentiary rules designed for adversary presentation of adjudicative facts may be dysfunctional when applied to investigation of legislative facts. Interpretative maxims gleaned from an historical political context in which property rights were paramount may be out of place in a contemporary context in which personal or social interests are to be given primacy.

To take one further example, a court staffed by skilled legal professionals may be a logical choice if the task at hand is defined as the ascertainment and application of legal rules. But the logic dissolves when the task is that of mediation, the promulgation of a new normative regime, or the assessment of economic data. Such tasks each demand a different form of expertise.

Thus, not merely because of historical circumstance, but because of contemporary experience, we have come to accept that there is a rather close correlation between the interventionist aims of law and its administrative expression, or conversely, between non-interventionist aims and the choice of institutional arrangements that conform to the formal-adjudicative model. Figure 2-5 seeks to capture visually this paradigmatic assumption which informs so much of modern regulatory legislation.

In Figure 2-5, the vertical axis represents a spectrum of legal institutional forms through which state intervention may be expressed, ranging from the ideal-type formal-adjudicative model (A^0) to the ideal-type administrative model (A^2). Movement up the scale signals the accretion of more and more administrative characteristics, such as expertise, staff, distinctive remedial powers; movement down signals greater and greater approximation to the conventional court, including the use of adversary procedure, formal pleading, and "ordinary" law. The horizontal axis represents the contribution of the political process to the initial conception, application, and subsequent reformulation of policies of state

FIGURE 2-5 The Effect of Legal Forms on Regulatory Impact: A Paradigmatic Understanding



intervention. (As Figure 2-4 indicated, "political" in this sense embraces as well social, economic and ideological influences, which are also manifest at each stage of the process.) Progression along the horizontal axis to P^1 and beyond, to P^2, signals greater and greater political support, or pressure, for intervention.

The paradigmatic understanding of how administrative form is related to effective state intervention may now be seen. Supposing a particular level of political support (P^1), the choice of an interventionist vehicle with some administrative characteristics (A^1) will lead to a given level of effective intervention (the unshaded area A^0 A^1 I^1 P^1). If the administrative character of the interventionist scheme is intensified (moving from A^1 to A^2), the extent of effective intervention will increase (by the shaded area A^1 A^2 I^2 I^1) even though the political process remains constant (P^1).

However, to place that understanding in perspective, even if the administrative form remains constant (at A^2), increased political pressure or support (from P^1 to P^2) will result in yet more effective intervention (the shaded area P^1 I^2 I^3 P^2).

The visual presentation has its limits, however. Although assumptions about the impact of institutional design and political pressure upon interventionist effects have been presented as conceptually distinct, they are obviously not unrelated in practice. Enhanced administrative characteristics are unlikely to sprout spontaneously; more probably they are a response to, or appeal for, political support. Conversely, the political process, in part at least, reacts to legislative and administrative initiatives: new structures and new levels of intervention may engender opposition or enthusiasm. The two elements interact; indeed, they may be simultaneous responses to the same stimuli.

As stated, the purpose of Figure 2-5 is to capture our paradigmatic assumptions about the need to adopt administrative forms if we are to make state intervention effective. An observation upon the relation between paradigms and behaviour will serve as a preface to further analysis. Paradigms, as reference to historical and contemporary developments was meant to show, are not cut from whole cloth; they are a distillation of experience. We have come to accept that administrative forms are more effective than formal-adjudicative ones because we have observed them to be so. At the same time, however, paradigms may distort observation and shape experience to make it congruent with what we already know and believe.

Against this background we now may ask why, in the "real world," the paradigm does not always hold, why regulatory impact is not always accomplished through administrative forms, or why, indeed, administrative forms are sometimes used for non-regulatory functions. The short answer is that the administrative-regulatory paradigm was not put forward as a verifiable account of positive social reality any more than was, say, the lawyers' view of regulatory legislation in Figure 2-3, or Adam Smith's unseen hand, or Marx's dialectic. The long answer brings us back to the main concern of this section: the relation among form, function and context.

A number of reasons may explain why, in a given instance, non-interventionist legislative goals are confided to administrative forms, or formal-adjudicative institutional arrangements used to advance interventionist objectives. While simple professional inexperience or technical misjudgment may sometimes produce such discrepancies between objectives and the means adopted to realize them, often other factors cause departures from the pattern proposed above. For instance, an apparent mismatch may result from a belief that the formal judicial model is too expensive for the processing of routine disputes, or from a desire to secure secondary objectives (e.g., spousal reconciliation or victim compensation) not normally attained in conventional civil or criminal adjudication. The converse decision, to entrust regulatory work to judicial workmen, may spring from less benign motives. It may evidence a lack of real commitment by government to its ostensible interventionist objectives, a wish to ensure that those

objectives are given merely symbolic and not real expression, or at best a fear that departure from traditional judicial forms may engender irresistible opposition.

To return, however, to the "normal" expression of interventionist impulses through the administrative idiom, can we assume that if only the appropriate form is selected, the desired functions will be carried out? Obviously not: even in apparently well-designed administrative systems, statutory purposes are not always realized, nor is efficient operation of the administrative process always achieved. Such assumptions of a perfect correlation between design and performance are not rare in legal circles, at least, and are often encountered elsewhere. But they are naïve.

It is no longer possible to imagine that once law commands (albeit clearly and with the massed voices of administrative cadres) ordinary people and corporations, social forces and economic power blocs, will obey without equivocation or resistance. We have too often seen the contrary. As we move from the givens of form and function to the problematics of behaviour, we must take into account the influences of context — legal, social and political. In so doing, we are merely making explicit certain aspects of the working model developed in Figure 2-4.

Legal Context

No statute, to borrow a phrase, is an island, entire of itself. In focussing upon any single legal regime (e.g., securities regulation) there is a danger that the influence of other regimes affecting the same conduct (e.g., tax, corporate, and industrial property law) may be obscured. Moreover, the constitution and the Charter may constrain our choice of legislative objectives and institutional forms. Thus, even at the formal level, ours is a system of potentially contradictory legal obligations.

The contradictions multiply when various legal actors respond to the law. Legal rules are often vaguely stated with scope for interpretative divergence amongst various judges or administrators, and between them and the legal advisors of the government and regulated parties; even "clear" substantive rules may be difficult to apply because of procedural or evidentiary rules; geographic boundaries set limits upon the effectiveness of even the most straightforward legal prescriptions.

Moreover, we must not assume that even formal and authoritative statements of law are universally understood and uniformly applied by judges, administrators, policemen, lawyers, companies, etc. Each of these actors may enjoy some overt or covert discretion with which to divert, reinterpret, or even effectively repeal formal legal rules. Each may do so in partial response to the responsibilities and objectives associated with the particular role or function being discharged.

Nor should we underestimate the extent to which values, beliefs and

ideologies are embedded in such roles or functions. For example, we have already mentioned the prevalence amongst legal professionals of an ideological commitment to the rule of law. We can imagine that such a commitment may well influence the performance of professional tasks such as legislative drafting, advocacy or judging. For example, a draftsman may have to choose between using precise or vague language in a statute, or between stipulating for procedures which are adjudicative or for those which are investigative, mediative or managerial. A judge may be influenced in deciding whether, or how, to apply the admonitory, injunctive, punitive or confiscatory sanctions provided in a statute. An advocate ostensibly defending administrative action may abandon positions in argument because the text of the statute does not seem to occasional and unsympathetic readers (himself and a reviewing judge) to support the action taken by his administrative client. Above all, the Charter as a projection of a professional, court-centred legal culture may reinforce and exaggerate such lawyerly attitudes.

The point is, then, that there are influences even within the legal system which tend to confound predictions about the future operation of administrative statutes.

Social Context

It has been observed that a form of internal "law" is often generated by semi-autonomous social fields, such as neighbourhoods and ethnic communities, trading networks and organized professions, unions and universities, business enterprises and public bureaucracies. These formal and informal "law communities" order both the relationships of those who populate them and, to an extent, their relationship with the outside world, through a system of rules which is sometimes explicit, but always well understood. This system of internal law may be enforced by a specialized, domestic sanctioning system, or by more subtle group pressures.

Since many of our most important daily social and economic decisions are taken within such contexts, and according to their internal law, it seems clear that we must explore the way in which the law of the state interacts with them. This interaction will depend upon many factors, including the internal cohesion of the social field, the assertiveness of the state system, and the degree to which their requirements converge or diverge. Where there is divergence, moreover, it is by no means clear that the internal law of the group will give way, as the extreme case of organized crime suggests. Rather, we may find that state law remains unenforced, or that it is enforced in such a way that it leaves the social field untouched, or, perhaps, even strengthened. On the other hand, state law may impose itself upon the social field, either because of its

internal weakness or because of the especial determination of the state to secure conformity.

The effectiveness of a regulatory regime may be influenced in at least three ways by the presence of semi-autonomous social fields. First, to the extent that it seeks to displace the existing internal law of regulated groups, it may or may not succeed in imposing regulatory objectives. Second, the regulatory agency itself becomes a "law community" whose internal law may or may not be identical to that of its constituent statute. Third, regulators and regulated may enter upon an informal, symbiotic relationship with its own internal law which defines accepted interpretations of state law, conventions of tolerated behaviour at (or even well beyond) its margins, and tacit understandings concerning satisfaction of each other's needs and objectives.

The larger society encompasses many such semi-autonomous social fields, and we must also keep in mind the effect of this larger social context upon the realization or frustration of regulatory objectives. We have already indirectly examined one aspect of this context, when we considered the effect of contradictions within the legal system itself. These contradictions are to an extent a reflection of the contradictions that must exist within any pluralistic society that seeks to accommodate divergent interests, beliefs and behaviours. Moreover, when we consider the political context of regulation, we will also be considering another aspect of social context. In truth, the three are closely intertwined.

Several other aspects of law in the larger society will be addressed at this point. First, significant differences in material circumstances may have an effect on the operation of law. Not everyone has equal access to legal procedures to vindicate his or her "rights." Cost, stamina, time and access to the best lawyers are not equally distributed. This may mean that law can be invoked more easily by some interests and individuals than others. Moreover, traditional attitudes of judges and lawyers, often reflecting traditional legal values (e.g., protection of property) may ensure that access to them is more worthwhile to some people than to others. Nor can it be assumed that governments can, or will, muster unlimited resources to confront powerful opponents, or even to maintain adequate surveillance of relatively weak ones.

These disparities in resources will obviously influence the strategies of both regulators and regulated. To the extent that regulation (or resistance to it) takes the form of a war of attrition, protracted, expensive and ultimately frustrating litigation over single instances, ultimate outcomes may depend less on substantive law than on substantial resources. To the extent that voluntary compliance can generally be secured through persuasion, mild threats, or implied promises of benign neglect, the limited resources of the state can be focussed on a few egregious offenders, to the advantage as well of more-or-less law-abiding firms or individuals.

It therefore becomes important to consider how prevailing soci attitudes also influence regulation. While such attitudes sometimes mar ifest themselves in conventional political behaviour, it also seems tha solid social support or opposition can directly influence the effec tiveness of regulation. For example, the public's willingness to complai about infractions will facilitate regulation by diminishing the costs c detection, enhancing the prospects of being caught, and offering suppor to stern sanctioning measures.

However, social attitudes operate perhaps more importantly at on remove from enforcement. The enactment of regulatory legislation ma either attest to the existence of considerable social consensus, or repre sent part of a larger strategy to build it. In either case, the ultimat objective is to promote the internalization of the values projected by th legislation.

On the other hand, where regulation is aimed at a relatively sma target group, whose important interests (power, prestige, money) ar threatened by it, a different social dynamic comes into play. In effect, contest may ensue for the hearts and minds of the public throug advocacy advertising and public statements, claims of public benefit c threats of public harm, preemptive non-coercive measures such as sel regulation or public enquiries, or occasionally high-visibility, extra-leg moves such as overt defiance or harassment.

As noted, the social context of regulation is closely tied to the politic context. It is there we turn next.

Political Context

In the end, regulation, like all law, is to some extent politics. Th decisions about whether to regulate at all, to what end, and by wha means are political decisions. But the political element of regulatio does not end with the enactment of legislation. It is simply transferred t other contexts.

Of course, the nature of the issues implicated in the regulatory schem will to an extent dictate the nature of its political content. Where, fo example, the issue is Canadian content in broadcasting, or the develop ment of new natural resources, political choices are being made whic directly involve the soul and body of the country. The evolution of polic in such areas involves not only the regulators but often other goverr ments, major economic interests, and advocacy groups in public debate and private consultation and lobbying. And the political content of th decisions being made may be overtly recognized by provisions fo cabinet directives or appeals, white papers, regulations, and majo legislative initiatives.

The politics of science and technology are perhaps less overt, bu hardly less controversial, than conventional politics. Information an

knowledge represent both forms of property and the means by which property is redistributed, controlled or even destroyed. Regulatory regimes that address such questions must therefore either develop their own capacity to generate and analyze knowledge or capitulate to those whom they are regulating. Here, then, we may find groups of experts representing industry, government and citizens contending over the probability of nuclear spills, the risks of pesticides, the source and effect of pollutants, the adequacy of protective measures, and the likelihood of ultimate human or ecological harm. And woven through these excruciatingly difficult issues we find such familiar political leitmotifs as the choices between public safety and scientific "progress," between consumer autonomy and the state's role as *parens patriae*, between private enterprise and public bureaucracy, between jobs now and health later.

Nor is it possible, in the end, to avoid the political content of regulation even when the state purports to be acting in a relatively neutral role, "merely" laying down procedural ground rules for marketplace behaviour or deciding disputes between contending interests. In industrial relations, for example, the state has apparently opted for a policy which promotes countervailing power through collective bargaining. But, some would argue, it has neither struck a true balance between the contending forces, nor accepted responsibility for the outcomes and failures of the system, nor addressed the plight of those who lie beyond its boundaries. Whether these complaints are justified or otherwise is beside the point; they reveal that political choices are implicit in the collective bargaining system itself, just as clearly as in legislation that imposes controls on labour market negotiations.

If, then, we can accept the premise that all regulation is ultimately political, we must try to identify the means by which politics becomes manifest. Perhaps the easiest way to do this is to consider what happens when a government feels it must embark upon, or maintain, a regulatory scheme even though it is not in the end committed to realizing its ostensible regulatory objectives. The reasons for such a discrepancy between real and ostensible goals are not difficult to imagine. The scheme may be necessary to attract the political support or avoid the defection of a particular interest group, or a large bloc of voters, or to respond to a well-argued report from a royal commission or expert advisors. On the other hand, if the scheme is to be pursued to its logical conclusion, and regulation is to become truly effective, the government may have to pay a price it deems excessive, for example, the alienation of powerful friends, the sacrifice of other policy objectives directed toward the same conduct or constituency, or unacceptably high administrative costs.

How, then, does government resolve its political dilemma? Often, it seems, it enacts regulatory legislation offering symbolic reassurance to

its proponents, but so constructs administrative arrangements as to ensure unwanted outcomes. As has already been mentioned, a government's failure to legislatively embody interventionist intentions in appropriate administrative structures may be a clue suggesting lack of commitment to accomplishing those intentions. But even if the structures are in place, they must be staffed adequately with able individuals committed to the philosophy of intervention; they must be defended from political attack and repaired in the event they are breached by a legal challenge; they must be renewed and extended as knowledge of scientific facts or the state of the administrative art expands; they must be disentangled from structures expressing inconsistent policies in other areas of concern; and, the most awkward exercise of all, apparently sound structures must be subject to periodic scrutiny to ensure they have not been captured by those they were intended to control, or become encrusted with an impenetrable overlay of complex and dysfunctional rules and procedures. Failure of government to respond to any of these challenges may bespeak a low level of commitment to intervention, with important consequences for the effectiveness of administrative action.

This analysis has proceeded on the assumption that regulatory intervention is meant to control behaviour in the marketplace or in some other context. However, government's capacity to encourage or undermine programs of social support and assistance is also easily demonstrated. For example, a welfare or human rights program designed to enhance the well-being of disadvantaged individuals may be denied an adequate benefit budget, or alienate its intended beneficiaries by the insensitive behaviour of poorly selected or ill-trained officials. Once again, administrative structures, however well designed, cannot do what government does not really want done.

Nor should it be thought that divergence between legislative commitment and regulatory performance always produces hypo-regulation. Hyper-regulation is a possible, and occasionally real, outcome. Legislation designed for one purpose can be used to reinforce another; apparently innocuous procedures can be used to prod or harass; the threat of future legislation may produce acquiescent behaviour; and regulatory objectives may be so well accepted (or even appropriated) by those being regulated that they act as if the law prescribes their behaviour even when it does not.

All these phenomena are easily observed in the daily operation of the modern Canadian state. Few close observers, or newspaper readers, will cavil at the notion that governments may sometimes say one thing in legislation and do another in the sphere of administration. It remains only to explain why government is itself neither an autonomous nor a single-minded actor.

The political process is dynamic. The decision to act is often a deci-

sion to react, to lobbying, questions in the House, exposés or editorials in the media, polls or political challenges from within or without the party in power. At each point in the process, from the initial commitment to legislation, to its drafting and enactment, to its realization through administration, to its subsequent revision, the dynamic persists and imposes itself upon the next phase of behaviour.

Moreover, we must ask who acts when "government" acts. Everyone concerned, from the cabinet and individual ministers to senior officials and their most lowly minions, leaves some imprint upon administration. While sometimes commands will in fact pass smoothly from top to bottom, and information in the opposite direction, there will not often be direct hands-on political management of the daily millrun of administration. Instead, some important, difficult and sensitive issues may be isolated for special consideration, ex post or ex ante, and overt political judgment asserted only then. For the rest, the political content of administrative action may be supplied by the overt messages of legislation, parliamentary speeches, etc., and by the subliminal techniques of patronage appointments, budget negotiations, discreet enquiries by executive assistants, and, above all, by a professional ethic which defines the conventions of action within the public service.

In the end, then, when we come to consider the impact of the political context upon administration, we cannot forget that we are dealing with a dynamic, complex phenomenon which must ultimately manifest itself in individual behaviours. It is the forces that shape these behaviours which will determine the real content of law, no less than the formal rules and the institutional arrangements selected to advance them.

Appendix A
Analysis of Professional Writing about Law

It is obviously not possible to offer a comprehensive account of how tens of thousands of Canadian legal functionaries, confronting "law" in their very different daily working lives, perceive its ideological content or intellectual significance. Apart from all other considerations, much of what they say and do is invisible, ephemeral, or distilled into formal outcomes that reveal nothing of the activity that produced them. Moreover, even at their most articulate (for example, judges pronouncing judgments; academics publishing articles; practitioners speaking or writing on matters of public policy or professional concern) legal functionaries tend to direct their attention to relatively narrow and practical matters, which do not easily yield to analysis. (For a typology of Canadian legal writing and its preponderant influences, see Consultative Group on Research and Education in Law, *Law and Learning* [Ottawa: Social Sciences and Humanities Research Council, 1983].)

However, acknowledging these limitations, an attempt was made to sample four different types of writing by legal functionaries: formal adjudication (court judgments); law reform and royal commission reports; scholarly books and articles; and informal professional discourse (lawyers speaking about law and the legal profession).

Formal Adjudication

Data Randomly selected cases from 45 *Ontario Reports* (2d series) 449–550 (1984).

Observations Ten decisions of trial and appellate courts in Ontario were examined. None of them revealed recourse to systematic empiricism or reference to deep (or any other) theoretical assumptions about law or the legal system. At most, there were several general assertions about the appropriate role of judicial discretion (pp. 447, 479), and elliptical references to the primacy of particular public policies (pp. 490, 514, 519), which might be characterized as "law in context." Most cases clearly viewed law as a set of rules, and explicitly stated that these rules were binding (pp. 457, 472, 507ff., 519, 526), or implicitly treated them as being so. In several cases, law was treated as a tool "capable of evolution in response to need" (pp. 497 and esp. 539).

Conclusion The formal adjudicative process (at least below the level of the Supreme Court of Canada) gives rise to almost no overt or articulate scrutiny of either social facts or socio-legal theories, although these are arguably refracted through the precedents, statutes, and other formal legal norms relied upon as "binding" rules or used as tools to accomplish presumed social purposes. Law is in fact seldom even related to its context except insofar as its own systemic requirements are identified and served.

Law Reform and Royal Commission Reports

Data Four important "law reform" reports were scrutinized: Royal Commission Inquiry into Civil Rights (McRuer Report, administrative law, Ontario, 1966); Royal Commission Inquiry into Labour Disputes (Rand Report, labour law, Ontario, 1968); Ontario Law Reform Commission Report on Family Law (Part iv, family property law, 1974); Law Reform Commission of Canada (LRCC) Report on Contempt of Court (1978).

Observations The McRuer Report and the Rand Report both express explicit (albeit summarily stated) liberal ideologies premised on the rule

of law, e.g.: ". . . the sole purpose of the democratic state is to regulate and promote the mutual rights, freedoms and liberties of the individuals under its control" (McRuer, p. 2); various "safeguards" for individual rights have emerged (pp. 4–5); and the McRuer Commission's aim was to explore their adequacy in preventing "unjustified encroachment by institutions of government or bodies exercising governmental authority" whose "mere existence is an encroachment" (p. 8). The Rand Report begins from the premise that the regulation of labour and management conflict is "the *sine qua non* of modern government" (p. 6). It proceeds to propose a regulatory regime within the limits implied by the following propositions, whose validity is said to be "accepted by the majority":

> the validity of private property; the acceptance of large scale private management and enterprise with regulation where the public interest is substantially concerned; that employees have a right to strike; that the right is socially desirable; that "free collective bargaining" is the most acceptable mode of reaching terms and conditions of employment; that leadership of the character of statesmanship in both groups, capital and labour, is the necessity of the hour; that respect for law and the maintenance of order are conditions of democratic survival. . . . (p. 18)

However, neither report can be said to articulate any "deep theory" about the relations amongst law, economy and society, or to use overtly even the modest empirical evidence generated (especially by Rand) during the course of its enquiry. Indeed, the McRuer Report's proposals are explicitly informed by an updated version of Dicey's "rule of law" as applied in a "hypothetical legal system" (p. 18): the approach is militantly anti-empirical.

At most, one might locate these reports within the law-in-context perspective, although each is atypically loquacious about its goals and assumptions.

The Report on Family Law relies much more extensively on secondary literature, some of which is grounded in empiricism or in theory. However, the report itself is not written within either of these intellectual perspectives. Rather it is replete with such contextual observations as:

> This [existing] legal system is . . . based upon, among other things, patterns of past and present social behaviour and economic organization, as well as the collective view of the community as to what is fair and equitable in the circumstances under consideration. (p. 1)

or

> The general law of property . . . has the effect of providing the basis for a broad range of social and economic assessments that are intrinsic to the way in which the community defines its culture. (p. 2)

But the law does not merely evidence the existence of given social relations; in the Commission's view, it has the capacity to transform them:

> Any change in the law respecting matrimonial property may in form be only an alteration in the isolated sphere of legal concepts, but in substance the change will be one that affects fundamental human relations in the community. . . . (p. 2)

The Commission "has tried to adhere to the constant theme of law as a means for achieving desirable ends" (p. 3) however much it is now

> in many respects founded upon premises that are in substance dead social conventions, archaic economic concepts or *laissez-faire* conceptions of private relations none of which are attributable to personal dignity or ordinary humanity. (p. 3)

Its proposals purport to reject

> a view of the parties to a marriage as the recipients of predetermined socio-economic roles (p. 3)

in favour of one emphasizing their status as "autonomous and independent human beings." But there is no scientific assessment of the extent to which the report's objectives are likely to be realized, or to which similar objectives have been realized, by legislation elsewhere.

The Report on Contempt of Court speaks directly to the role of courts in a liberal-democratic state, emphasizing the need to reconcile freedom of expression about the justice system with the need to preserve that system from illicit influences (p. 9). The role of judges as "the supreme representatives of the administration of justice" (p. 10) is assured because litigants "will have inevitably received a decision untainted by prejudice or bias" (p. 10) — a "fact" neither grounded in empiricism nor tested against much contrary theoretical writing. Conceding that the legitimacy of any attack on the system "really depends on the particular facts and circumstances . . . it is up to the courts to fix the limits of tolerance on the basis of general statutory provisions . . ." (p. 11). Since a judge must remain "above and not in the debate [i]t is . . . perfectly normal for society to take up his defence" if he is attacked and "to punish such attacks by the rule of law" (p. 12), through the device of statute-based contempt of court rules.

The report rejects the suggestion that a contemnor might plead "truth" or "public interest" as a defence to prosecution, because of "serious practical problems" including the risk of "judicial guerrilla warfare" by "certain people, for ideological, political or personal reasons" seeking to discredit the judicial system, and the availability of other forms of recourse to anyone genuinely fearing judicial bias (pp. 27–28).

This approach might fairly be characterized as viewing law as a tool, to be used especially for the legitimation and effectuation of the justice system's institutional interests. It again betrays neither analysis based on systematic empiricism, nor carefully explored theoretical premises.

Conclusion Since its inception, the Law Reform Commission of Canada has made special efforts to ground its reports in both social fact and theory (see S.L. Sutherland, "The Justice Portfolio: Social Policy through Regulation," in G.B. Doern (ed.) *How Ottawa Spends* (Toronto: James Lorimer, 1983).) However, these efforts have apparently been diluted by the Commission's own over-ambitious program, and by the professional and political context within which it functions. The extent of this dilution has recently been made clear by various statements concerning the government's legislative program in areas in which the LRCC has long been interested.

Nonetheless, the worst that can be said of the LRCC is that it has adopted, to some extent, the typical intellectual and ideological stance of other bodies charged with law reform: social enquiry tends to be derivative, anecdotal, or non-existent; theory is distilled into conventional wisdom or eschewed altogether; political values are taken as a non-debatable given in a society that resolves conflict pragmatically, and by consensus.

Formal Scholarly Discourse in Law

Data Legal books and articles (results of a survey by Alice Janisch, *Profile of Published Legal Research* [Ottawa: Social Sciences and Humanities Research Council, 1982].)

Observations The Janisch study shows that little interdisciplinary scholarship in law has developed in Canada, even in the most recent period studied, 1978–80. Even "legal theory," which is there defined as reflection upon formal legal materials from an internal perspective, is shown to have barely emerged as an intellectual enterprise separate from doctrinal exposition.

Very recent trends in scholarship, since 1980, may signal some change (e.g., in historical studies and in the use of microeconomic analysis). However, the bulk of academic "research" and "scholarship" in law still does not seem to reveal a fundamentally different intellectual perspective from professional discourse. (Arguably — but the point is not documented — ideological perspectives are somewhat more diffuse, ranging from critical legal studies [neo-Marxist] to microeconomic [often anti-interventionist, pro-market] analysis. But the "undifferentiated middle" of liberal-democratic assumptions predominates overwhelmingly.)

Conclusion Legal scholarship that departs from the typical professional analytical mode or from conventional liberal-democratic ideology is rare, and hence its contribution to enhanced understanding is likely to be of considerable significance.

Informal Professional Discourse

Data Randomly selected articles from two legal newspapers (*Ontario Lawyers' Weekly* and the Canadian Bar Association's *The National*) during the period September 1984 to February 1984.

Observations In principle, it seems accepted that the goal of law reform, is instrumental: "keeping the law responsive to the changing needs of Canadian society" (*The National*, November 1983). However, stress is placed on the need for "consultation" not only with the public, but especially with the profession: "We [lawyers] have to be equipped to respond to government legislation. . ." (ibid., September 1983). This need has an explicit political premise; "members of the legal profession bring to any consultative process the very valuable perspective of historical balance and insight . . . by the very nature of the law, precedent must be appreciated. . ." (*OLW*, February 28, 1984). And it assumes a recognizable style: "lawyers . . . have drawn on well-honed skills of persuasion to adapt the abstract notion of the public interest into something quite specific: a legal argument" (*OLW*, January 20, 1984).

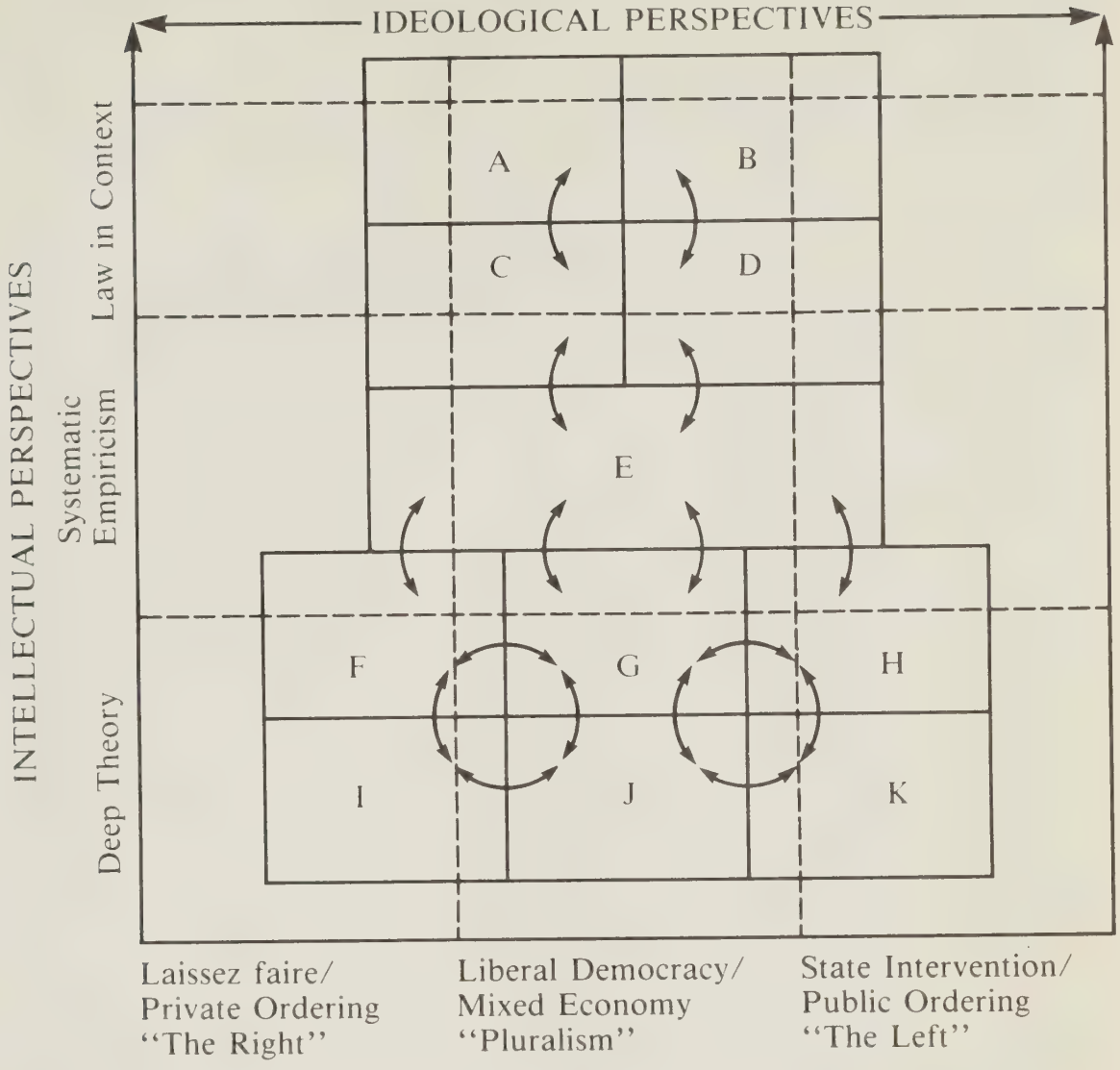
Conclusion The legal-professional culture assumes and articulates the preemptive claims of legal functionaries to a key role in the process of accomplishing legal change. It visualizes a style of participation based on internalized values and familiar modes of lawyerly discourse, rather than external perspectives, or open-ended intellectual enquiry. The ideological perspective is mainstream conservatism, rather than reactionary or radically transformative.

Appendix B
Analysis of Empirical and Theoretical Writing about Law

This Appendix displays in summary form (Figure 2-B1) the results of a "trial run" at using Figure 2-1, the map of understandings about law, to analyze empirical and theoretical writing about law. In order to define (at least by illustration) the type of work included in these two categories, brief reference is also made to some law-in-context studies, which draw upon empirical and theoretical insights.

The methodology employed was simple: an eclectic list of books and articles was read, and each work was assigned a location on the map. The primary purpose of the exercise was to see whether asking questions about intellectual and ideological perspectives would generate sensitivity toward those aspects of each work (neither of which was necessarily explored in an explicit manner within the work itself). Whether the

FIGURE 2-B1 Studies of Law's Relation to the State, Society and Economy



coordinates on our map served this purpose is a matter of subjective evaluation; each reader must arrive at a judgment after attempting the exercise; my own reaction was positive.

A secondary purpose was to identify distinguishing qualities of these studies not encompassed within the proposed intellectual or ideological perspectives. Appreciation of the need for a third, topographical dimension on our map resulted from this trial run. Aspects of this third dimension are briefly referred to in the main text as intensity of climate, verticality, and texture; other aspects may suggest themselves to other readers.

Next, the exercise served to show that it is possible to identify affinities of various works to each other as well as differences amongst them. Thus, one can understand that despite their ideological opposition, law-and-economics studies and critical legal studies can both be characterized as deep theory; both purport to draw upon certain aspects

of structured social enquiry, and both draw upon certain aspects of liberal rights theory. At the same time, one can remind oneself that the critical legal studies movement claims to be an opening to the left on the spectrum of legal ideas despite its increasing divergence from traditional Marxist thought.

Finally, the limits of all mapping are brought into focus. As the arrows in Figure 2-B1 indicate, various groupings flow into and influence each other. Particular authors arguably belong in two or more groups, either on the evidence of a single work, or as their work moves over time across an ideological spectrum or through several intellectual modes.

In short, the main benefit derived from the mapping exercise is whatever one takes away from the doing of it. The reification of perspectives and categories is a risk, which can be discounted only to the extent they are used tentatively and with a sense of their limits. The affinity of authors contained in groupings A–K is briefly suggested in the following list. (For full references see the bibliography at the end of this Appendix.)

A. Liberal legalism: the legal system expressing and guaranteeing a minimum vision of state action (e.g., McRuer Report; see Appendix A).
B. Reformist legalism: the legal system expressing and guaranteeing improvements in social relations and economic advantages for historically repressed groups (e.g., Ontario Law Reform Commission Report on Family Law; see Appendix A).
C. Deregulationist: "soft" empiricism, with policy bias toward competition (e.g., Janisch and Irwin).
D. Regulationist: "soft" empiricism, with policy bias toward state intervention (e.g. Auerbach, W. Friedmann).
E. Positivist sociology: systematic empiricism, with variety of possible policy biases (e.g., Black, Trubeck).
F. Law and economics: modelled representation of reality and use of socio-economic data with strong pro-market, anti-intervention bias (e.g., Posner).
G. Sociology of jurisprudence: convergence of social science and liberal theory, to propose reflexive or articulating theories of law (e.g., Reich, Nonet and Selznick, Teubner) or new interpretations of socio-legal development (e.g., L. Friedman, Falk-Moore, Trubek).
H. Classical Marxism: modelled representation of reality and use of socio-economic data, with explicit critique of market capitalism; use of state mechanism as transformative device; covers a wide spectrum from social democrats to Leninists (e.g., Renner, Pashukanis, Balbus).
I. Classical liberalism: deep theory of the limited state, emphasis on personal autonomy, spontaneous ordering (e.g., Fuller, Nozick, Epstein, Hayek).
J. Rights theory: deep theory for modern liberal democracy; constitutional rights as the basis of civic entitlement and as a mandate for social reform (e.g., Dworkin, Rawls, Rostow).

K. Critical theory: neo-Marxist critique seeking radical transformation of social relations through transformation of the social consciousness by which they are defined or constituted (e.g., Thompson, Unger, Gordon).

While the major purpose of the exercise was to attempt to "populate" sectors of the map and thereby to test its utility as an analytical device, certain additional substantive insights contained in the literature may also be summarized briefly.

The Empiricism/Deep Theory Distinction

Systematic empiricists acknowledge that their methodologies are rooted in various theories of knowledge (Black 1972). In turn, many but not all theorists argue strenuously for the need to ground explanatory theories about law in detailed, empirical knowledge of the phenomenon being studied (Gordon, 1984); the absence of such grounding is said to jeopardize both the coherence of the theory and its explanatory and prescriptive powers. Given this general sense of reciprocal missions, however, an issue in the literature is the extent to which attempts to define spheres of "reality" for purposes of sociological study themselves impose atheoretical and illicit distinctions upon like phenomena, or arbitrarily exclude from sociological analysis phenomena appropriate for such analysis (Nonet, 1976).

These observations are especially pertinent to any exploration of law's relation to the economy and society. For example, a study of the legal dimensions of regulation might define "law" as "the normative life of a state and its citizens" (Black, 1972). Even given an explicit empirical orientation (a commitment to defining "norms" on the basis of observed behaviour) such a study might exclude important insights gained from reflection upon the convergence or contradiction amongst norms in various spheres of regulatory activity or upon the content and power of norms originating outside the boundaries of state-citizen relations, e.g., in "private" bureaucracies such as credit institutions. To be yet more explicit, would such a study, whose primary data are drawn from observations on the behaviour of regulatory agencies, strengthen or undermine the claims of democratic pluralism, or catch the full flavour of how non-accountable "private" actors can control specific markets involving virtually all of the "public"?

Nor, to continue the point, is it easy to escape from the implications of the notion that "private" and "public" are themselves arbitrary and context-specific terms, as is the very concept of "regulation." Thus, when a government, commission, or administrative tribunal is invited to regulate or deregulate specific behaviour, it must understand that both terms imply the existence of a state of nature in which government abstains from directing corporate behaviour in some way. But do corpo-

rations exist in a state of nature? Is not the very creation of the corporation regulation of the relations amongst those who aggregate, lend and invest capital, amongst directors, managers, workers, suppliers and customers? And do not even avid exponents of deregulation anticipate that the state will regulate customers who seek to avoid payment, competitors who steal trade secrets, and workers who engage in secondary picketing during a labour dispute?

In short, one must be careful to define one's terms and to acknowledge their contingency and value-laden character. To do so is a first and necessary step in the evaluation of all social and economic behaviour, especially when that evaluation claims to be rooted in careful empirical analysis.

The Epistemology/Ideology Distinction

Figure 2-1 and the accompanying text are meant to suggest a list of questions about legal research and proposals for the use of law as a vehicle for state action. To put these questions in their simplest form, they invite us to identify "what do you understand by the term law?" and "how do you basically feel about state decision making, as opposed to individual/corporate autonomy, in particular spheres and more generally?" Thus framed, the questions would appear quite unconnected, as indeed they are, to an extent. However, the literature reveals certain important affinities between epistemology and ideology.

Some of those affinities are conceded to be circumstantial. For example, those who seek to alter the legal system in some particular way must first "make out a case," must falsify the claims made by existing institutions or in favour of existing legal rules. Since institutions have a way of defining the language of debate in terms that suit them best, and since legal rules at least claim to tend toward coherence, there are limited opportunities for challenge by using accepted values or modes of analysis. To be sure, when such challenges can be mounted they are virtually unanswerable. If we can show that a system that preaches one set of values practises another, or that a body of rules is self-contradictory, some response is called for. But the nature of the response tends to be limited: a change in practice or a revision of the rules; the system or the overall rule structure remains unaffected. It is only when we change the method of analysis that we increase the prospects for more fundamental change.

In legal research, the movement from one epistemological position to another was not merely the accidental result of growing intellectual curiosity or virtuosity. It was often the best available vehicle for an ideological challenge to the social vision embodied in (or fortified by) the existing legal order (Gordon, 1984).

To illustrate, both the law-and-economics movement and the critical

legal studies movement can be said to reside at the level of deep theory (although they are very different deep theories). Each represents the culmination of an ideological project which rejects liberal legalism in the regulatory mode in which it has existed since the 1930s. Thus micro-economic analysis has sought to demonstrate that regulation imposes unacceptable costs on wealth-creation, and critical analysis has argued that regulation leaves existing power relations largely unimpaired, with the implied (or explicit) message that the powerless should seek solace elsewhere.

This is not to argue that either mode of analysis is rendered illicit because of the ideological predilections of those who happened to adopt it at a given moment. Indeed, it might be argued that left and right could each have adopted another intellectual perspective on law altogether.

On the other hand, a considerable body of literature contends that particular ways of looking at law are inescapably linked to given ideological premises, indeed, that law itself serves explicit ideological functions of legitimation (e.g., Evans, 1982; Trubek, 1984). Thus some contend that neo-classical economics disguises value judgments as methodological imperatives, and that rigorous empiricism is of necessity incompatible with the development of either radical critique or transformative theory.

Naturally, one wants to avoid the unwitting adoption of ideological perspectives smuggled into research conclusions via the methodology upon which those conclusions are based. Once again, the only safeguards against this happening reside in an attempt by both researchers and readers to be explicit.

The Law/Society Distinction

If legal-professional literature tends to display too little awareness of the fact that law is a social process, some social science research tends to overemphasize the point, giving insufficient weight to law's distinctive characteristics.

It has for some time been accepted that law is not wholly autonomous, that its form and content in some way respond to external influences. The extent of those influences and of the vestigial force of legal culture, institutions and rules and the nature of the responsive or adaptive mechanisms have given rise to an extensive theoretical literature, some but not all of which is empirically informed.

Much of that literature tended to assign to law a distinctly derivative or subordinate role, as expressing directly or in explicitly instrumental ways the purposes, interests or world view of dominant groups. Subtler versions of this position assumed that law was mystificatory or justificatory, tending to obscure, or generate willing acquiescence in, the hegemony of these groups.

Much of this literature treats rather dismissively the law's own formal sources: statutes and cases, secondary literature and theories. Some recent studies, however, have begun to turn again to these sources as a beginning point for the explication of the social significance of law which, they propose, can be glimpsed by breaking law's literary "code."

Unlike the doctrinal school, which is obviously devoted to the systematic exposition of legal rules, this "critical" look at legal materials is intended to accomplish radical transformations of society by the demonstration of contradictions within its prevailing myths. Since law is one of the most durable and articulate expressions of social mythology, it is a particularly apt target for such analysis.

What is the significance of this literature and its insights, for "consumers" of legal research? The "critical" school, above all, reminds us that ideology is immanent in all forms of discourse. For adherents of this school, it is ideology which constitutes society, which provides a framework within which ideas and events take on meaning, and in the absence of which they are unintelligible. A well-advised consumer of research, especially one charged with important policy initiatives, should therefore spend some time reflecting on the ideology which constitutes its own social reality, and the extent to which that ideology is coherent and congruent with the deep aspirations it is supposed to embody.

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Notes

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No "thinkpiece" materializes out of thin air. My ephemeral references at several points to our political and legal cultures are given some substance by a few examples in Appendixes A and B. I am grateful to my research assistants, Susan Bazilli and Judy Fudge, for their help with these aspects of the study. They also contributed to the bibliography provided in Appendix B, which places some aspects of this study in their intellectual context.

"Thinkpieces," moreover, often result from collegial discussion and vigorous debate. I have had both, and a full measure of detailed criticism, from my research assistants and from Hans Mohr, Liora Salter, and Rod Macdonald — all of whom might prefer to be spared association with the end-product. Andrée Lajoie and Ivan Bernier, on behalf of the Commission and as thoughtful scholars in their own right, made significant contributions to the work. My thanks to all — I think.

3

Canadian Law from a Sociological Perspective

GUY ROCHER

This report is part of a broader examination of the subject of law, with particular emphasis on Canadian law. This examination, carried out by jurists for this Commission, is multiple in focus and has taken a number of directions. It may, however, be said that beyond the diversity of the subjects and themes that they have chosen, the researchers have all examined what might be called *macrolaw*[1] as opposed to *microlaw*. Here the term macrolaw should be taken as referring to law as an instrument of economic, social or cultural policy — in other words, law in its political role, the term "political" being understood in its broadest, and one might say noblest, sense. Microlaw, on the other hand, is law applied to daily life for the purpose of governing and regulating relations between and among individuals and groups. This is the law to which each person refers and has recourse, the law that lawyers and notaries practise on a daily basis.

Addressing their reports to a government commission of inquiry, the jurists who prepared them all adopted a macrolaw perspective, examining the political role of Canadian law with regard to problems of the family, the environment, consumers, labour, the national economy, poverty and so on. In particular they sought to determine how law had thus far contributed to the solution of problems in each of these sectors, how it had perceived and attempted to solve these problems, and what contribution it could make in the future.

The macrolaw perspective is also shared by sociologists. The latter have long been interested in the various forms in which power is exercised, be it political power or power of some other sort. Law, then, appears to them quite naturally as a mechanism by which powers are exercised and regulated. However, it has not yet become common,

particularly in Canada, for sociologists to focus their attention on law. Jurists have long been the only ones to discuss law among themselves and to consider it as their exclusive field of knowledge and practice. It thus seemed to me to be necessary to justify or perhaps legitimize sociologists' concern with the law and the interest that it holds for them. This explains why the first two parts of this study are general in nature: they are intended to explain what a sociological perspective on law may represent. The third and fourth parts of this report deal more specifically with Canadian law.

The Historical Roots of the Sociology of Law

Pure and Impure Law

The sociological viewpoint on law necessarily falls within the perspective of the general theory of law, since sociology applies its particular focus to the foundations of law. But this focus is clearly quite different from that of a Hans Kelsen, for example, who sought to construct a theory of law in itself, without reference to the economic, social and political conditions that serve as its context: what Kelsen called a "pure" theory of law.[2] Not that Kelsen's undertaking is to be condemned. His pure theory of law has shed too much light on various aspects of law to be dismissed outright. It was legitimate to want, as Kelsen did, to grasp law as an entity sui generis, a complete system, and from there to break it down into its elements and identify all the articulations. This approach had a definite and demonstrable heuristic value.

But even though it can be the object of pure theory, law is not, in reality, a pure entity. Kelsen wanted to react against the dissolution that threatens law as an entity when it is analyzed from an exclusively historical perspective. He wanted to free it from the straitjacket of history so as to analyze it in terms of its most essential, basic and universal elements. It is this determination, both ambitious and austere, that gives Kelsen's work its originality and importance.

Jurists have undoubtedly been more sensitive than have historians and sociologists to Kelsen's work, for it shed new light on their field of study. Historians and sociologists, for their part, have been more inclined to point out the limits that Kelsen placed around law and to draw attention to the consequences of these limits. This divergence in views serves to emphasize the gulf that has long separated jurists from historians and sociologists. Jurists devote themselves to the study of law as a logical system of norms, values and sanctions, a comprehensive system complete in itself. Their approach would seem to have been supported by historical trends. Over the last two centuries in particular, law has tended to become a more logical, coherent and closed system, and the study of law, especially during the 19th century, has increasingly become a professional endeavour. Law is now the province of legal writers

because it has become so; that is, its proliferation and increasing rationality have made it the exclusive domain of a body of experts who in our society have become its only authorized interpreters — authorized by the state in the case of judges, and by the training received and the degree held in the case of practitioners.

Although neither Kelsen nor the jurists could prevent law from also being considered as an "impure" object, that is, as something with social as well as legal elements, yet at a time when law was becoming established as a closed, logical system, this second type of analysis could be carried on only cautiously, as a parallel undertaking. Even in Germany, where the great law history movement, most particularly associated with the name of F.K. von Savigny, had largely identified law's origins in mores, customs and culture,[3] this movement was associated with an explicit ideology and conservative political and legal views because its research tradition was presented as defending and illustrating Germanism or the German *Geist*. Its influence was limited, both geographically and in time, by the debates that it generated around the proposal to codify German law. In fact it constituted an opposing view, for it advocated a German legal system whose meaning and strength would be derived from its historical roots extending back to Roman law, to which it claimed to be the successor. In contrast to von Savigny, Kelsen raised law above historical contingencies and attributed to it the traits of universality and timelessness. Thus, for jurists in Western societies, Kelsen's work offered more appeal than did von Savigny's, as the latter was too closely identified with a nationalistic and conservative movement.

Germany and its historical school of law aside, jurists were justified in seeing themselves as the privileged if not exclusive guardians of the study and interpretation of law. Thus law was examined, analyzed and explained only in terms of legal perspectives and terminology. Such a perspective served to extricate law from the complex realities that surrounded it, and to which it was attached, retaining only those aspects or elements that lent themselves to a simplified explanation expressed in abstractions. According to this perspective, then, law might be considered as the emanation of a collective will, of which the state was both the expression and the instrument. The intricacies of the process by which law is actually developed eluded this definition, which posited law as an absolute entity, the transcendent expression of abstract political wisdom. Similarly, judges were seen as the unimpeachable interpreters of the law because their judgments were inspired solely by the logical order of the system of legal norms without regard for any other consideration. Both law and the state as a maker of laws and an entity in law were put forward as abstractions, isolated from all context.

At the core of this theory of law was an equally abstract theory of the state. It is therefore not surprising that, apart from the history of law as advanced by von Savigny, it was the analysis and critique of the state and political power that was to open the way to another major treatise on law.

Critique of the State and Law: Marx and Engels

Here we can distinguish three different modes of attacking the problem. The first, oldest and most forceful was undoubtedly that of Marx and subsequently Engels. It appears that Marx had hoped to embark on a critical analysis of the state, but in the end his life was entirely devoted to a critique of capitalist economics. Nevertheless, throughout his work one can find the elements of a critique of the state and law. For Marx, the state cannot be abstracted from the class society of which it is a key element. It is integral to the power relationships that exist between those who own the means of production and those who are alienated from them. More precisely, the state is a creation of these power relationships insofar as it has gradually developed as the guarantor and protector of private property, that is, of the interests of those possessing wealth and especially the means of production: resources, capital, tools, materials, machines and knowledge. In the context of the class struggle, which constitutes the basic dynamic of capitalist society as conceived by Marx and Engels, the state throws the weight of its action and prestige behind the wealthy.

Law, being defined, maintained and sanctioned by the state, is one of the main instruments by which the state actively intervenes in this dynamic. By its rules and sanctions, law shores up a social and economic order based on the inequality of forces in the class struggle. In the form of norms for what "ought" to be ("*sollen*"), it expresses a social state that in reality is the product of a struggle of unequal forces, between a dominant class and an exploited one. This is the "repressive" function that law performs in and by way of the state. But it also performs another important function, that of legitimation. It justifies the power of the state, private property, and the use of force. It thus helps to create and maintain "false consciousness." This is its ideological function.[4]

It is thus not astonishing that Marx and Engels predicted that the destruction of private property must lead to the withering away of the state and law in the communist society that was to flourish on the vestiges of capitalist society. This concept of the withering away of the state and law was scarcely taken up by Marxist analysts, except for Pashukanis, and he met with Stalin's disapproval and ultimately was liquidated by him. Nevertheless, the economic analysis of the state and law, introduced by Marx and Engels, was taken up by many analysts of more or less explicitly Marxist inspiration and still exerts great influence. In the United States, it is to be found particularly in the works of sociologists of law who describe themselves as "radicals." These are critics of the existing order and some of them are neo-Marxists. Among them are Piers Beirne, Alan Hunt, Ralph Miliband, Robert M. Rich, Richard Quinney and Paul Q. Hirst. It should be noted, however, that in the United States, more than anywhere else, the sociology of law has, in

association with criminology, tended to focus on penal law, as may be seen in *Law and Society Review*, the foremost U.S. review of the sociology of law. In Britain, neo-Marxist analysis of law and the state is very active and is mainly centred in two publications: the *International Journal of the Sociology of Law* and the *Journal of Law and Society* (formerly the *British Journal of Law and Society*). In France, Althusser and Poulantzas initiated a reflection on the state and law. Their influence was international in scope, and in France a number of legal writers have participated, centring around Michel Miaille and the irregularly published review *Procès*.

The Sociology of Law: Max Weber

The second attempt at social analysis of law was made by Max Weber,[5] who came along in the wake of Marxist thought and carried on a long intellectual debate with it throughout his life. A jurist, historian and economist more than a philosopher, he too attempted to understand capitalist society, but he focussed on other dimensions, which in his opinion had been neglected by Marx and Engels. In particular, he wanted to emphasize the fact that religion, law and the state each have an internal "rationality" or life of their own that does not exclusively obey the imperatives of production relationships or class struggle. This rationality, which is not independent of economic relationships, in turn has a far from negligible impact on economic activity and economic structures. In his well-known thesis, Weber sought to show that one cannot explain why capitalism developed in the West over recent centuries — not earlier and not elsewhere — without reference to the religious factor. It was the distinctive feature of Puritan theology that it developed a view of this world and the next which, however indirectly and unintentionally, called upon its followers to adopt rules of moral conduct that encouraged saving, productive labour and investment, the key elements of capitalist behaviour. All the other religions had, by their theology and moral teachings, either inhibited such behaviour or at least not encouraged it as forcefully. To be sure, since the 16th and 17th centuries, various conditions and social and economic structures had been in place that were also to contribute to the advent of capitalism: the rise of the bourgeoisie, freedom of trade, expansion of markets. But such conditions had also existed in other times and other places without giving rise to capitalist society. For this it was necessary for a particular religion and moral code to look upon capitalistic economic behaviour as positive rather than negative.

Weber dealt with the state and law from the same perspective. Neither, according to him, is independent of the economy. Each has its own distinctive rationality. Each has other economic functions in addition to those attributed to them by Marx and Engels. As regards the state,

Weber develops and explores the concepts of power and authority, making them the core of his analysis. Power has rules of its own which it is important to clarify: rules of legitimacy, from which various types of power and authority are derived; rules of organization for the exercise of power according to the types of power. In this connection Weber wrote his famous study on bureaucracy as a form of organization that is important, and indeed almost essential, for the exercise of political power. Bureaucracy has its own internal logic, from which Weber sought to derive the "ideal type" (*Idealtyp*), or what today would be called the abstract model, to which nothing in reality corresponds perfectly, but of which all the constitutive elements are to be found in the real world, although not brought together at the same time. Weber saw bureaucracy as a key element for understanding the rationality of political power, particularly in the modern state. The latter, he felt, came closest to the model of authority that he called "legal" authority, as opposed to "traditional" authority and "charismatic" authority. Legal authority was defined by Weber as being that authority whose legitimacy rested "on a belief in the 'legality' of patterns of normative rules and the right of those elevated to authority under such rules to issue commands."[6] More than all others, modern Western societies have stressed the legal foundation of the legitimacy of the state. While elements of traditional legitimacy (royalty) and charismatic legitimacy (the leader) are still to be found, they take on a marginal or incidental character in a state whose legitimacy and functioning are both primarily based on legal rationality.

From this perspective, it is understandable that Weber needed to look more deeply into the nature of law. Hence the important role played in his work by the sociology of law, which, unfortunately, Weber was unable to explore completely before his untimely death. As he had done with respect to religion, Weber pondered the specific nature of contemporary Western law. And as always, Weber proceeded according to the comparative method notable in his work. This led him to adopt a very broad and extensive view of the different varieties of law that have existed throughout history. The type of law that prevails in modern Western countries is only one among many. What distinguishes one type of law from another is the mode of legal thought on which it is based, or, more specifically, both the relationship that legal thought maintains with logical rationality and the type of formalization that it introduces into its reasoning and procedures.

Using these two criteria, Weber develops a typology of legal thought, classifying it as either irrational or rational, formal or substantive. He illustrates these types of legal thought concretely in the different ways in which law is practised by those whom he calls the different "honoratiores" of law. These are the different types of legislators or jurists, classified according to the model of legal thought that inspires them: judges, theologians, jurisconsults, pontiffs and clerics, etc.

Weber classifies modern Western legal systems (as in common law countries and countries with codified laws) as being among those that have gone furthest in developing a rational and formalized system of legal thought. This type of law is guided by general principles, abstract concepts and logical reasoning, whether it draws on principles and concepts and applies them logically (codified law) or constructs and alters the principles and concepts through the reflection necessitated by each new case, in accordance with the rules of an appropriate system of logic (common law).

This legal rationality is not independent of economic rationality. The two depended on each other in order to establish themselves, and they reinforced each other. Capitalistic economic activity was able to expand insofar as it had the advantage of a rational legal system by which it was possible to predict the actions of others and the consequences of these actions. If a certain religion (Puritanism) was necessary for this development, a certain type of law (inherited from a rediscovered and renewed Roman law) was also an essential condition. A similar interaction was established between the organization of political power and law insofar as the rationality of law served to give the state foundations in legitimacy as well as rules of bureaucratic functioning. A logical and rational legal system defined the status and jurisdictions of political authority. In return, the latter assured the legal system of a more or less exclusive sphere of authority.

In closing, I should like to emphasize two important features of Weber's sociology of law. First, Weber's sociological perspective is not external to law. It goes to the core of law, seeking to discern there its mode of thinking and its conceptual and logical structure. I shall return to this point later. Second, Weber was inspired by a vision of society that today would be termed "systemic." While he did not construct an explicit model of the social system, Weber had a highly developed sense of the interactions and reciprocal influences of the different components of society: economic, political, legal, and cultural. This is particularly evident in the outline that he left of his sociology of law.

Max Weber's influence on the sociology of law was and continues to be sizable throughout the world. The sociological writings that refer to Weber's work, explicitly or even implicitly, are too numerous to be cited here. However, it is perhaps in Germany and anglophone countries (perhaps especially in the United States) that he has had the greatest influence, more so than in francophone countries; furthermore, his works have been largely translated into English.[7]

Political Science and Law

In France especially, political science has represented a third approach to analyzing law from other than an exclusively legal perspective. The

French school of sociology, led by Emile Durkheim, was far from unassociated with this development. Indeed, it was initially sociological theory and Durkheim's conceptual framework that inspired French jurists to open new channels of theoretical reflection on law. This was particularly the case with those who were known as the "institutionalists," such as Maurice Hauriou and Léon Duguit.[8] From Durkheim they borrowed the concept of the institution, defined as a relatively coherent set of rules and norms of conduct relating to a particular sector of social or collective life.

This concept was particularly applicable to law, for, as noted above, law is basically composed of a relatively organized set of rules and norms which, in addition, are noteworthy for being among the most explicit rules and norms in the culture. Law may thus be perceived and analyzed as an institution in itself, particularly in its relationships with other institutions whose rules and norms are not necessarily as explicit. But the institutionalists — particularly the jurists among them, as opposed to the sociologists and political scientists — did not go far in this direction. Nor did they form what strictly speaking could be called a school, even though their influence was widely felt.

At this point we should note an exceptional work explicitly inspired by French institutionalism, namely the work of Santi Romano. In 1918, Romano published a remarkable treatise entitled *Ordinamento giuridico* (the legal order).[9] It has been said of this work that it is as much a general theory of law as a sociology of law. Romano distinguishes between two meanings of the word "law."

> In the objective sense, the word may designate two things: (a) an "order" in its totality and unity, in other words, an institution; (b) a prescription or a set of prescriptions (particular norms or provisions) grouped together or arranged in various ways, which, in order to distinguish them from nonlegal prescriptions, we characterize as institutional, so as to emphasize their link with the entire order or institution of which they are elements, a link that is necessary and sufficient to establish their legal nature. [Translation][10]

Romano's treatise is concerned with law as understood in the first sense, that is, as a totality of norms, rules and sanctions constituting an institution or, as we would say today, a system. What is original about Romano's analysis is that it finds that any society contains a number of legal orders: "There are as many legal orders as there are institutions" [translation].[11] The governmental legal order (relating to the state and its agencies) is only one of the legal orders that exist simultaneously in a given society. It is undoubtedly the most visible one and the one receiving the most official recognition of its legal nature, particularly in modern societies, owing to the pre-eminence that the state and its legal system have acquired; but it is not the only one. Romano analyzes other, nongovernmental legal orders: international law, ecclesiastical law, legal

orders that the state may view as illicit or that may be unknown to it (for example, outlawed social movements or political parties that have gone underground, secret societies), and nongovernmental legal orders that are recognized by the state and possess their own internal regulations (associations, trade unions, industries, educational institutions, etc.). According to Romano, the existence of a number of legal orders must be recognized, for there are different relationships (mutual recognition, divergences and convergences, reinforcement or opposition) between the various orders, particularly between the nongovernmental legal orders and the governmental legal order. An analysis of these relationships may shed light on the dynamics of the legal system, either in its totality or in its parts.

Romano drew inspiration not only from Hauriou but also from von Gierke. However, in stressing that his own concept of institution or order was "more fundamentally legal in nature" [translation] than the concept of organic community used by von Gierke, Romano made a point of distancing himself from the latter.

Unfortunately, Romano's work has remained relatively isolated and unknown. It is only recently that it has been exhumed from the silence that has enshrouded it.

Political science or political sociology was to progress along its own path, largely independent of, if not opposed to, law, in analyzing the state and political organization. Studies were conducted on political parties, governmental structures, decision-making processes, the public service and the bureaucracy, electoral processes, pressure groups, and elites. These studies helped demystify perceptions of the state as guardian of the collective will, as neutral arbiter of disputes, and as supreme centre of decision making. In this sense they paved the way for the later sociology of law.

But political science was uninterested in law, just as law was uninterested in political science.

> This explains why political science's crucial discoveries regarding the role of pressure groups, elites and the bureaucracy made almost no mark on the general theory of law or the analysis of particular rules or institutions. The line of communication was broken. Law remained fixed in its immutable and transcendent concepts. Political science, in producing an increasing number of empirical studies, continued to expand our knowledge of the legislative process. It had almost no influence on legal thought, and indeed it created a distorted understanding of political phenomena by consciously ignoring the legal component of these phenomena. [Translation][12]

Political science helped put in place the elements required for a political and sociological analysis of law, but, in so doing, it long refused to have anything to do with law. This explains why political sociology was slow in arriving at a sociology of law, despite the central place that law occupies in the exercise of political power.

The Fundamental Dimensions of the Sociology of Law

The sociology of law, which has been taking shape for a number of years, has inherited much from the different sources noted above. It continues to be influenced by them, either implicitly or explicitly. But it has also distanced itself from them, as we shall see. In this section, the postulates of the sociology of law, the concepts of law to be found in that field, and the stages of the legal process will be described.

Postulates of a Sociology of Law

I shall begin by briefly summarizing the main postulates or premises of the sociology of law as it is understood at this point in the fields of education and research in sociology.

The relativity of law Law as we know it in modern Western societies is only a particular type of law, among other possible or existing types. The typologies of Max Weber are still used or cited by sociologists of law. Similarly, the place that law occupies in modern Western societies is not necessarily the place that it occupies in every society. Western societies have granted above-average power and prestige to the state, whose legitimacy is seen as primarily based in law, and they have, by the same token, given more than average power and prestige to law. Of course, law history and comparative studies in law had already established these facts, and anthropology has recently confirmed them by expanding the comparison to societies that do not figure in either law history or comparative law.

The autonomy and dependence of law Law enjoys a certain autonomy insofar as its development and interpretation are based on a rationality and logic that are specific to it. But this autonomy is relative, since the development, interpretation and application of law take place within processes in which other forces are at work: power strategies, the interplay of interests and pressures, inspired by the attitudes, ideologies and values of all those participating in these processes in one capacity or another. These various influences make themselves felt when laws are being developed, for "lawmakers" are not the only ones to make law. Furthermore, studies on the implementation of law and on "law in action" make it abundantly clear that, under the influence of these strategies and workings of power and interest, the law as actually applied may differ from the law drafted by the lawmakers.

Internal and external analysis of law Law is explained and interpreted by jurists according to an *internal* method of analysis of law, that is, according to rules of interpretation and modes of reasoning that enable them to draw conclusions as to what the law "really" means. But it is

also possible to explain and interpret the law according to an *external* method of analysis. Thus, taking the law as stated and following the interpretations of the jurists, external analysis seeks to understand it through its relationship to ideologies, values, and economic, political and social structures. This is the type of analysis conducted by economists, political scientists, sociologists, anthropologists and psychologists. It is complementary to that of the jurists.

The critical function of external analysis By its very nature, external analysis exercises a critical function with respect to law, for it always seeks to break down certain myths relating to law, such as: that law emanates from the legislator; that legal rationality is impermeable to any other consideration or influence; that law is the equivalent of justice; that all citizens are equal before the law and the justice system. Of course, this critical function has been accentuated by sociologists of law of a Marxist or neo-Marxist persuasion. In their analysis of law in capitalist societies, they have sought to shed light on the hidden relationship between law and the ruling classes, law and the ideologies of the ruling classes, the role of law in the maintenance of false consciousness, and the legitimation of the established order (or disorder).

Although there are others, these may be considered as the four main postulates underlying the sociology of law at this stage.

Concepts of Law

As well as the premises described above, three main concepts of law underlie sociological studies of the subject.

Law as an element of social control This is the *regulatory* concept of law. According to this concept, social organization is perceived in terms of the constraints that the members of society impose on each other and on themselves. Such constraints operate either through the social structures to which they belong (family, occupation, workplace, social movements in which they have a rank, status or role) or through the common culture that they share and whose norms, customs, values and sanctions they recognize. This regulatory concept of social organization owes much to Emile Durkheim, for whom the specific nature of the "social fact" (that is, the object of the study of sociology) resides in the constraints that persons experience or impose on themselves or each other by virtue of their communal existence.

In this context, law may be seen as one of the forms assumed by social control. Indeed, it is its most visible, explicit and institutionalized form. It is in law that norms and rules are expressed most clearly (particularly where the law is in writing) and sanctions are most predictable. Of course, there are many other, less explicit, forms of social control that

may be as effective as or even more effective than law. However, the formal nature of social control when it is embodied in law gives law a special role. This is why Durkheim used law as the main indicator for distinguishing what he called societies of mechanical solidarity (societies dominated by "punitive" justice) from societies of organic solidarity (in which a "restitutive" justice system has developed).[13]

It is mainly the branch of sociology known as "functionalist" or "structural-functionalist" that has adopted and developed this regulatory approach. In the functionalist model of social organization, law acts as a stabilizing and harmonizing influence in disputes. In specifying the subjective rights of the parties involved, whether individual or collective, it ensures that a certain rationality prevails. In this the state plays a certain role, but not, according to the functionalist view of law, a predominant one. It is society as a whole that controls itself through recourse to law and legal institutions.

Special mention should be made of what in the United States has been called "sociological jurisprudence," a concept largely inspired by Roscoe Pound. Pound, through his numerous writings in the first half of the 20th century, sought to develop a jurisprudence, or science of law, based on sociology, using in particular the theory of social control advanced by the U.S. sociologist Edward Ross.[14]

Law as a repressive institution Here law is integrated into a theory of the state, and is primarily seen as an instrument of the state. Being responsible for securing and maintaining public order, the state of itself acts repressively toward any fringe behaviour, any expression of protest, deviance, opposition, criminality, counterculture or nonconformity. It is through law that the state expresses the concept of public order that it wishes to see prevail, and it is by the arm of the law that it represses anything that threatens or obstructs this order.

This perception of law is particularly prevalent among two groups of researchers. The first consists of the sociologists and political scientists who subscribe to the Marxist critique of capitalist society. Being tied to the dominant class, the state maintains and oversees a public and social order that benefits mainly those who already enjoy economic power. Political and economic power combine to complement and reinforce each other, but in reality the ones who truly hold power are those who own the means of production in the economic sphere, rather than those who hold positions of political power. In the final analysis, political power is in the hands of those who have economic power. In the class struggles that are always present in capitalist society, the state is not neutral because it is enmeshed in the interests of the wealthy class. The repression that it carries out through the law and through legal institutions thus serves the interests of this class.

The second group of researchers consists of those interested in the

sociology of penal law. Here the repressive character of the state and law is more evident than anywhere else. The state has the responsibility and indeed the obligation to repress and punish any activity defined as criminal. Thus sociologists or criminologists studying the functioning of penal institutions see law primarily from this perspective of repression. This branch of the sociology of law has been given the name of "sociology of social control," but the expression is used here in a more restrictive sense than above; it refers mainly to the social control exercised by the state, its police and its courts in response to various form of criminal deviance.

Law as an expression of ideology Here law is perceived above all as an element of a society's culture. It expresses some of the values shared by the members of the society, as well as the society's dominant ideologies. Not only does law express them, it puts them into action and applies them in concrete situations. Only rarely will law, the legislators or judges explicitly verbalize the ideologies or values inherent in the law, but these ideologies or values underlie the rules, sanctions and judgments and are the implicit justification for them.

The ideological foundations of law have been probed from both an idealist and a materialist perspective. From the idealist perspective, the values of a culture are the cement that binds together and unifies the members of a society in a common world view, a shared *Weltanschauung*. This common view of the world is the principal basis for any social group, whatever its size, from the family unit to the global society. Since law expresses values and ideologies, it acts as a unifying agent. The "spirit of the law" reflects the national spirit, the genius of a people.

According to the materialist or radical perspective, law also expresses values and ideologies, but these are primarily the values and ideologies of the ruling class. If society is basically divided by the existence of private property, if it is beset by class struggle, it cannot be analyzed in terms of its unity; rather, it must be examined in terms of its contradictions. The law is among these. Through the values and ideologies on which it is based, it serves to legitimate the economic and political power held by the ruling class. Inasmuch as the values and ideologies of the ruling class are always presented — falsely — as being those of the society as a whole, the law also serves to mask social contradictions and the unequal distribution of strength and power.

The Stages of Law

On a more empirical level, sociology distinguishes between three stages of law. If we take an overview of the various sociological studies of law, we find that they focus on one or other of these stages. The three stages

are: the development of law, the law as developed (what might be called the written law, or positive law), and the application or implementation of law.

The development of law It is not surprising that the development of law has received particular attention in sociological studies of law. This is the stage in which there is interaction among legislators, civil servants, political parties, interest groups, pressure groups, the media and public opinion. It is also at this stage that we see the jockeying for influence or power, lobbying, various intervention strategies, and ideological alliances and alignments of convergent or divergent interests. Not every act, regulation or ministerial directive is necessarily the product of such a range of actions. But many are, particularly when the economic, political or ideological stakes are high and the clashes of various types of interests intense.

The process of developing acts and regulations involves a growing number of writing phases, which provide the analyst with a rich supply of documentation: presentation of briefs to the lawmakers or the executive; parliamentary commissions and debates, the proceedings of which are published verbatim; commissions of inquiry whose activities are public and whose reports are published; and working papers leading to the drafting of acts or regulations. Some documents relating to recently enacted acts or regulations remain inaccessible: internal working papers of the government, memorandums to cabinet, proceedings of ministerial or cabinet committees, internal memorandums and correspondence, etc. However, it sometimes happens that interviews with inside informers will serve indirectly to lift the veil partially on the contents of documents that are not yet in the public domain.

Still it must be stressed that the analysis of these various types of documentation constitutes only one stage in the sociological analysis of the development of acts and regulations. The analyst who does not go beyond this stage runs the risk of giving a false image of the process or at least not rendering its full social significance. It is important to situate the actors or groups of actors involved socially, to place them in context, so as to bring out factors such as the economic, commercial and professional interests that they are pursuing and that motivate them. The explicit justifications that actors or groups of actors give for their involvement, and which can be read in public documents, often hide other, less noble motivations that will never be voiced, still less put into writing. For example, the use of concepts such as "the public interest," "public order," "the national interest," "the common good," "justice" and "equity" must be decoded so as to detect beneath this facade the concrete interests of the actors in their political, economic, social and ideological context.

In short, a piece of legislation or a set of regulations appears to the sociologist analyzing it as the product of power struggles whose origins must be sought in the political, social and economic structures as much as in the sphere of values and ideologies. This is what might be called situating the process by which law is developed, placing it in context. It is as a result of the latter process that the analysis can have an *explanatory* value, documenting the emergence of law in relationship to the complex reality of a particular society.

Finally, it should be noted that these power struggles have a historical as well as a contemporary context. They often undergo changes over a given period. The diachronic (historical) perspective frequently sheds light on the synchronic (present-centred) analysis of the development of acts and regulations.

Radical political scientists and sociologists who, to varying degrees, draw their inspiration from Marxist teachings have unfortunately made too few empirical studies of law. Even so, their theoretical writings have helped to formulate and clarify this problem in the study of law. By stressing production relationships and the economic structures that, in their view, ultimately shape the law, they have helped point out the need not to neglect the dynamics of the power struggles, economic and otherwise, that underlie the development of law. In this sense the sociological study of law, whether or not it is carried out from a radical perspective, serves to shed a critical light on law.

Law in itself, as legal thought A distinction is often made between the types of analysis of law carried out by the sociologist on the one hand and the jurist on the other. The former, it is said, carries out an external analysis of law, while the latter conducts an internal analysis. I have employed this distinction above. It is also said that the sociologist treats law as an object, whereas the jurist treats it as a subject. By these distinctions, it is meant that the jurist tells what the law says; by virtue of his training and experience, he is the interpreter of the law. The sociologist explains why the law says what it does.

These distinctions are useful in that they serve to delineate clearly the different, and complementary, approaches followed by the sociologist and the jurist respectively in their analysis of a common subject, namely the law. However, in its elegant, perhaps too elegant, clarity, this distinction conceals a problem. I said above that Max Weber's sociology of law had as its main object "legal thought." It must be recognized that while sociologists of law, at least those who are non-Marxist, like to see themselves as deriving from Weber, they have not followed his teachings insofar as they have only barely explored the sociological foundations of legal thought. It must be said that such an analysis requires a good

knowledge of law on the part of the person undertaking it, and sociologists and political scientists do not generally have such knowledge.

Of course it could be argued that the distinction between external and internal analysis is valid here again. The sociologist who wants to explain legal thought does not primarily seek to tell what the law says, but rather to tell how what the law says relates to the dominant ideologies, values, social organization and political, economic and social power relationships. It must nevertheless be admitted that in this type of endeavour the line of demarcation between the sociologist and the jurist has become blurred. External analysis of law is directly tied to internal analysis. Subtly, integration of the one with the other is becoming necessary.

Law, understood in the sense of positive law, is primarily and essentially a type of discourse. It is not a concrete, tangible, material reality. It is spoken and written. It is a language.[15] The written or spoken word gives it its reality. In this specific sense, law thus belongs to the symbolic universe of social existence, that is, the universe of words and concepts, both of which are fundamentally symbolic.

But in the symbolic universe of social existence, law occupies a distinctive place, owing to some of its traits. First, it is an *official* discourse. It is created, developed, interpreted and amended by persons in positions of authority: the "honoratiores" of Max Weber. In Canada, they consist of legislators, the executive power and the judiciary, if we confine ourselves to the sphere of formal law. Second, it is a *directive* discourse: it sets out rules, norms and prohibitions, and at times it specifies the sanctions relating to them. It orders, commands and prohibits. It may sometimes be merely declaratory or rhetorical, but only to announce the rules more effectively. Third, this discourse is *universal* for a given society. It applies to everyone, even when it is addressed only to certain categories or groups of citizens. Fourth, it is *pragmatic*: its goal is to bring about an action in specific cases. Law in this sense is an active discourse which must be realized in actions and behaviour. Even when laws are not applied, in principle they should be, and at any time they may be. Fifth, law is fairly often a *prospective* discourse. It says not only what must be at the present moment, but also what must be in the future. Law not only organizes the present, but also quite often gives shape to the future. Finally, law is a *socio-economic-political* discourse. It is not addressed to the isolated individual; rather, it governs interpersonal relationships or interactions, or it addresses itself to groups, categories of people or collectivities. Quite often, the law's interest in these social interactions relates to property concerns, including the exchange, transfer, division, protection and destruction of property. In addition, the law governs social relations having to do with the exercise and division of power, including political power. It may thus be said that law draws on or reflects a particular view of society.

As a symbolic universe, law is a discourse laden with references to intellectual, religious and moral traditions; it has developed and continues to develop under the influence of various concepts of the world and society, various interests, and various power struggles between social groups, categories, classes, strata, etc. Thus, behind the pragmatic rules that it sets forth, the court decisions that nourish it, and the legal doctrine that emerges, law is a transmitter of values and ideologies that need to be known. It is in this sense that law is also a type of "social thought": it both is and reflects a view of society and life in society.

An example of this type of analysis is provided in *Les origines doctrinales du Code civil français* by André-Jean Arnaud,[16] a work based on his doctoral thesis for the Faculty of Law at the University of Paris. A sociologist and jurist, Arnaud carried out historical research exploring the sources of the legal thinking that lay behind the drafting of the French civil code. But the sources he identified were, in the final analysis, primarily philosophical: rationalism, individualism, nominalism, idealism. Without disparaging the value of such research, I must point out that the author confined his attention to the intellectual universe inhabited by the drafters of the code. Furthermore he did not attempt to identify the social context of that universe.

If sociology is to contribute effectively to a deeper understanding of law, and if it is to have any hope of one day contributing to the general theory of law (having done little in this direction thus far), it must become involved in exploring legal thought.

The implementation of law The field here is much broader and more diverse than the preceding ones. It covers everything that might be called "law in action." Once law has been established — by the legislature, the executive and the courts — how is it actually applied? Here several avenues of research have been explored, some more extensively than others.

The courts are the primary and most authorized interpreters of acts and regulations. Much research has been done on the functioning of the courts, the decisions they render, and the reasons they give. But it is perhaps in penal matters that most of this research has been conducted, particularly in the United States.

The proliferation of public law has led to the formation of a vast army of public servants responsible for administering the bodies created by these acts and applying the acts themselves. In the daily performance of their duties, these public servants must interpret the act or regulations in each case that comes before them. Insofar as acts or regulations are vague, ambiguous or silent on certain points, an unofficial case law develops in the bureaucracy, and in effect it has the force of law. Thus "law in action" is created by government officials who are not officially

empowered to perform this function; such "case law" will rarely be sanctioned by either the legislature, the executive power or the courts.

In penal matters, various officials are responsible for the application of acts and regulations: police chiefs and officers, investigators, prison and penitentiary directors, guards and social workers. They relate to different categories of persons — victims, suspects, lawyers and prosecutors, witnesses, inmates, etc. — in accordance with their interpretation of the statutes under which they are acting.

The extension of delegated legislation has endowed the executive arm of government with ever growing powers to regulate, under the powers conferred on it by statutes. Occasionally the executive goes beyond the legislation and actually makes law, either consciously or inadvertently. In such a case, there is not necessarily an aggrieved party, or one that is aware of being aggrieved, to contest a regulation that is ultra vires.

Of course, it is not only public bodies that apply and interpret acts and regulations. Large financial, commercial and industrial enterprises and large institutions, both private and public (universities, for example), have their own legal services. These serve various purposes, among which are to interpret legislation in accordance with the interests of the enterprise or institution and to establish the latter's internal regulations. Such actions serve to extend the scope of "law in action."

A number of acts, by the time they receive official assent, are the product of a compromise between differing interests and points of view. Their preparation and development have often been accompanied by discussions, representations, lobbying, and so on. Once an act has been assented to, the various pressure and interest groups do not necessarily cease their activities in relation to it. They may still hope that the application of the act will be beneficial to them, depending on how it is interpreted and implemented. Thus the struggles that surrounded the development of some pieces of legislation carry on through to their implementation. The same actors are involved, but the strategies may not be entirely the same, depending on the content of the legislation.

The above list is far from exhaustive. But it gives an idea of the range of the subject matter available for analysis here. One of the foremost U.S. theorists on the sociology of law went so far as to say:

> With one phrase, *legal effectiveness*, we capture the major thematic concern of contemporary sociology of law. The wide range of work that revolves around the legal-effectiveness theme displays a common strategy of problem formulation, namely a comparison of legal reality to a legal ideal of some kind. Typically a gap is shown between law-in-action and law-in-theory.[17]

Donald Black may be criticized for thus having reduced the sociology of law to what we are calling one of its stages, but the above quotation shows the importance that studies on the implementation of law have gained in the sociology of law, particularly in the United States.

Formal and informal law The three stages of law just described leave out a vast field of study that cannot be ignored: namely, the entire field of what has been called informal law.[18] This term is used to cover all forms of economic, social, penal and cultural regulation that cannot be characterized as state law, but that in their effects are similar to it.[19]

The concept of formal law is relatively clear, insofar as it is understood to apply to the various acts, regulations, orders and directives that emanate from the state and its authorized representatives, and of which the courts are the acknowledged interpreters. As a concept, informal law is necessarily more fluid, more vague; its boundaries are less clearly drawn than those of formal law. It also varies in scope from one country to another and from one period to another.

In advanced industrial societies, the scope of formal law has grown considerably over the past century, with the expansion of public law. Nevertheless there is a vast field of informal law, both outside the state and within it. Furthermore, the United States and now Canada are seeing what Richard Abel calls "a movement toward informalism,"[20] associated with the reaction in favour of deregulation.

From the sociological standpoint, the dynamic between formal law and informal law is of great importance. In relation to law as an entity, it is situated either upstream (at the law-development stage) or downstream (at the law-implementation stage). Informal law may be considered a forerunner of law, a way by which formal law comes into being. The latter often draws its inspiration from informal law, which in a way serves as a proving ground for it. It is this dialectic that André-Jean Arnaud stresses in his analysis of the relationship between what he calls the state legal system ("*le système juridique étatique*") and other legal systems.[21] For he believes that informal law consists of a number of legal systems. An alternative view is to consider informal law as a means of keeping various areas of regulation out of the reach of the state or of retrieving from the state various areas of regulation that it has invaded. The parallelism between the areas covered by informal law and those covered by formal law does not, however, mean that there are no other dynamics operating between the former and the latter. On the contrary, there may be a parallelism that is based, for example, on the delicate and fluid power relationships that exist between the public sector of the economy and the state, between church and state, or between the network of private institutions (in the fields of education, health, social services, etc.) and the state. By analyzing in its entirety the dynamic relationship between informal law and formal law, we can situate the latter in the larger sociological context of the various forms of regulation, economic and otherwise, of which it is a part.

The circularity of the stages of law In the preceding paragraphs, we examined the three stages of law, from its development through to its

implementation. However, this does not provide a complete picture of the dynamics involved. While it is true that there is a movement of law from above to below, from the lawmakers to citizens before the law, there is also a significant movement of law that occurs "below," among citizens and law professionals, and that may on occasion rise upward, toward the lawmakers and the higher courts.

The microlaw we mentioned at the beginning of this report is, in fact, the law as experienced daily by law professionals and citizens. The multitude of contracts of all types by which citizens commit themselves constitute perhaps the largest part of this living law. To be sure, the lawmakers and the courts have set certain limits to contractual freedom. Contract law is thus not fully independent of what comes from above, but within these limits, contractual freedom is extensive, and notaries, lawyers and citizens have room to exercise initiative. The same may be said of the right to make one's will, for example.

Just as informal law, of which we have just spoken, can be a forerunner of formal law, so can the living law practised by citizens and law professionals sometimes lead to new legislation which either is based on this living law or sets up new guidelines for it. Furthermore, case law is primarily nourished by the living law.

There is thus a certain circular movement in law. Contract law, for example, is practised within limits set from above, by the legislature or by case law. But it also happens that the actual practice of contract law draws the legislature's attention to the need to legislate, or that new court decisions are handed down which change the ground rules.

This circularity of law is manifested in many other ways. For example, the application of a piece of legislation by public servants or by an appropriate public body may, in time, reveal inconsistencies or deficiencies in the legislation and lead to protests and complaints from citizens. It is thus this movement of circularity that will lead the legislature to amend its laws in order to correct or add to them.

The presentation of the sociology of law made in the first and second parts of this study will now serve as a guide, inasmuch as it offers some explanation of what may constitute a sociological perspective on Canadian law and the view of society on which it is based. The law studies prepared for this Commission generally do not deal extensively with the law-development stage. However, they offer the sociologist more material for analysis and reflection with respect to Canadian legal thought and the law-implementation stage.

Law as a Social Value

The Mythicization of Law

Before we enter into the subject of Canadian law in order to determine what values underlie it, we should first speak of law itself as a value.

Canada is one of the countries in which, according to Max Weber's typology, the legitimacy of law is based above all on legal rationality. It is by virtue of constitutional laws that the state is established as an authority with recognized legitimacy, and the state exercises its power by means of a legal discourse (statutes, regulations, court decisions, directives). The lawmakers may make all the laws they want, but they are never themselves above these laws. For a society to legitimize political power and the exercise thereof on the basis of law, it must have reached a point where it assigns a high value to law. Law thus becomes a value in itself; it is perceived as being endowed with almost unassailable virtues, undeniable truth and indisputable authority.

One can go a little further and say that this validation of law is based on a certain mythology of law. Law is elevated to the rank of myth, in the sense that the term is used in anthropological studies: myth of origins, myth of the rhythm of the seasons, myth of nature, etc. The mythological character of law is to be found in certain perceptions of law that are shared by the citizens. Among these perceptions are the following:

- Law is the source of justice. The judicial process reestablishes justice, renders justice to each person, and reveals and punishes the truly guilty.
- The law is just because it is the same for everyone. All are equal before the law. The law does not discriminate.
- The law is an authority above everyone. The same obedience to the law is required of all.
- The law has a certain sacred quality. It comes from higher authorities: the state, the courts.
- The law is rational, logical. It is free of feeling and passion; it is emotionally neutral.
- The judicial process is neutral. The judges judge according to the law, following the law and only the law. All other considerations are excluded from their judgment.
- Law is a learned discourse, a science.
- Law is a useful science. To know the law is to have power.
- Under the law each person has rights and obligations. Knowing one's rights is a source of security and power.
- There can be no society without law. Law is essential to social peace and order. A society without law would be given over to all the appetites; it would have no limits.
- Justice has a long arm. Throughout his life, a guilty person runs the risk of eventual discovery and judgment.
- To have a police record is a disgrace that marks a person for life.
- The laws are made by the highest authorities, in the common interest, for the purpose of public order and the protection of citizens.
- Law and the social order go hand in hand. Those who attack the law want to disturb the social order.

- Law and morality go together. What the law prescribes is never immoral. The law protects public morality and contributes to private morality.

From the above list of perceptions, it may be seen that law derives its value from other values, which may be designated as deeper, more fundamental, *strong* values. These are: justice, equality, rationality, and social order. Law is a concrete, visible expression of these strong values. It gives to these abstract values a form and a certain materiality.

It is not possible to explore here in detail the process by which the mythicization of law has taken place. However, six factors may be underlined. (1) The expansion of the commodities market under the capitalist system necessitated a corresponding expansion of civil law as a means of regulating the growing number of economic relationships. (2) Industrialization and urbanization, leading to the development of large centres and more complex social organization, ultimately caused an upsurge in public law. Consequently the state tended to involve itself in an ever growing number of sectors. (3) The role of state expanded, and this made it necessary for its legitimacy in law to be consolidated. (4) An inevitable result of these trends was the professionalization of law, which occurred throughout the 19th century. Over the entire course of the French regime, lawyers were prohibited from coming to New France, in the belief that this would reduce the quarrelsome spirit of the colonists. This indicates that, at the time, lawyers did not enjoy a good reputation and were seen as unnecessary. It was not until the 19th century that the legal profession gradually earned its place and acquired a certain prestige. (5) With political power being exercised increasingly through law, men of law began to enter political life, which they saw as another element of prestige both for themselves and for law. (6) Lastly, the legal profession associated itself with universities for the training of its members. The latter were required to obtain a university degree, and ultimately the universities were exclusively entrusted with the training of jurists. The legal profession and the field of law benefited from the growing prestige of the universities.

All these factors combined to give law and the legal profession an aura of authority. This aura continues to be carefully maintained by means of the decorum and verbal respect that are accorded to the judicial process, lawmakers, and representatives of public order, and by the scholarly as well as imperative character that is attributed to law.

The Demythicization of Law

It must, however, be recognized that there is another side to the coin. To the mythicization of law there is an opposing view. Parallel to the positive perceptions of law listed above are a series of other perceptions contradicting them. The following are examples of the latter.

- There is no justice.
- The laws are bad.
- There are too many laws.
- The laws we have are the wrong ones.
- Laws are made for the rich.
- Only the rich can obtain justice in the courts.
- A person who has money can get out of anything.
- Laws are made to be broken.
- There is one law for the rich and another for the poor.

The above statements may be considered as involving the demythicization of law. But it is worth noting that these negative judgments also belong to the mythicization of law, insofar as they say what good law should be. Behind these judgments there is the idea of good law, which would truly meet the requirements of justice, equality, rationality, and social order, that is, the four strong values identified above. These judgments express, in the negative, the feeling or hope that things could be different.

There is yet another discourse that is critical of law, namely, the radical discourse. It is associated with a critique of capitalist bourgeois society and a social order that it contests because it considers it basically a social *dis*order — a social order based on inequality, injustice, and power struggles between the wealthy and the dispossessed. Law, then, is seen as a fraud, inasmuch as it camouflages social disorder while serving to create and maintain it. Here it is no longer a matter of merely demythicizing the law, but also demystifying it, exposing it as a hoax.

Yet even this radical discourse belongs to the mythology of law. It attacks the established disorder, but in so doing it suggests that there can or will be another social order, truly based on justice, equality and rationality. The four strong values are once again in evidence.

The various considerations presented above on the mythicization and demythicization of law serve to explain the phenomenon by which law has come to acquire the value that is now attributed to it. That process responded to economic and political necessities; it was based on values that have come to predominate in Western societies in recent centuries. These are the values that served to support the movement to democratize these societies and to nurture the utopian vision of a democracy that is always in the making and never actually achieved.

It may be said, then, that the enhanced value of law is deeply rooted in the mentality and the spirit of citizens of modern democratic societies. The very ambivalence noted with respect to the law (the simultaneous existence of both positive and negative attitudes in the same persons and the same groups) is evidence that the law is not a reality to which even the ordinary citizen is indifferent. The critical perceptions of the law reveal frustrated expectations regarding a system of law that is not equal to what it was supposed to be or what was expected of it.

From this perspective, the deregulation movement, beyond the economic interests that it serves, cannot be interpreted as a rejection of law. On the contrary, there is some evidence in public opinion of feeling that law, in proliferating, has become increasingly ineffective and that if there were less formal law it would more likely be better applied.

The Perception of Canadian Society by Law

As we have just seen, law is in itself a social value, because it expresses other values. These are values that we have characterized as "strong": justice, equality, rationality, and social order. Not only is law a value, but it is also a transmitter of values.

However, the relationship between law and values is a complex one to explore. The law almost never explicitly refers to the values and ideologies underlying it. As P. Orianne said in a study on precisely this subject,

> No legal norm constitutes the straightforward expression of a given social value. Firstly, because the norm fulfills a practical function that must be performed in accordance with certain formal modes of action to which, hypothetically, the pure definition of a value does not lend itself. Secondly, because in the performance of this function, the number of values to be taken into account is such that, in the legal order, the place to be assigned to a given value is necessarily limited by the place occupied by other values. [Translation][22]

I shall therefore not undertake direct analysis of the values underlying Canadian law. I shall instead attempt to perform the same task through somewhat indirect means. I shall attempt to discern the vision of society that emerges from Canadian law. This vision emerges fairly clearly and can be reconstituted along certain axes.

It should, however, be emphasized at the outset that "Canadian law" is of course far from monolithic; in many ways it is multifaceted. But there is one fundamental distinction that we shall encounter often throughout the analysis that follows: the distinction between the law made by the legislature and the law as interpreted by the courts. As we shall see, there are fairly significant differences or contradictions between the visions of Canadian society implicit in the two types of law. Drawing mainly on reports on legal subjects prepared for this Commission, I shall present a few of the main features and contradictions of this vision of society implicit in the law.

First, the society perceived by Canadian law is primarily a capitalist society. This view is expressed in many ways in the laws themselves and in the jurisprudence. The main principles of this society are private property and the respect owed to it, free enterprise, the right to profit, and recognition of the great economic law of supply and demand. There

is nothing surprising in this; a finding of the contrary would have been truly astonishing.

The main point of this vision of capitalist society is, of course, the privileging of private property. Throughout Canadian law, private property appears as a transcendent, sacred and unassailable reality. Its legitimacy is never called into question.

The problem that arises in Canadian law is thus not one of recognizing the primacy of private property; this primacy is considered as self-evident. Rather the problem that arises at some point is that of the limits or constraints to be imposed on private property on behalf of other considerations and other values. On this point, Canadian law is split, and its monolithic facade is shattered: the legislature and the courts do not share the same vision of society. More than the courts, the legislature is sensitive to "socialistic" considerations that tend to contradict or run counter to some of the basic tenets of capitalism. This has been particularly evident in certain sectors: labour relations law,[23] environmental law[24] and federal and provincial intervention in the economy.[25] For the past several decades, there has been a divergence between, on the one hand, legislation taking account of collective interests and limiting the exercise of individual property rights, and, on the other, the courts, which have more continuously and consistently upheld the interests of property owners and the protection of their patrimony.

The law as interpreted by the courts is imbued with the spirit and principles of civil law. This is particularly evident in areas (such as environmental protection) in which it is necessary to advance collective interests that transcend individual interests.

> An examination of the common law property rules, for example, illustrates the same blind acceptance of the right of individuals to pursue their own self-interests, subject only to certain minimal restrictions when that right clashes with a similar right in others. . . . First, land (real property) is seen as little more than another factor of production, a marketable commodity that deserves no special recognition or status in society.[26]

The capitalist vision of society is concerned not only with the relationships between personal property, but also with the relationships between individuals. Framed in accordance with the notion of property and free competition, this vision gives rise to an atomized image of society, in which collective, community imperatives always appear as an embarrassing countercurrent. Common law thus leans in favour of the

> pre-eminence of individual rights over public and community rights. In fact, the law today seems to regard community rights at most as the sum of the rights of the individual members of the community, and not as something that may be greater than or in some way transcend individual rights.[27]

Perhaps more than any other area of law, labour law illustrates this vision of society. Only slowly has there emerged a body of labour law that takes

account of collective entities (trade unions) and collective bargaining. It has been necessary to make changes to a body of civil law that had become clearly unsuited to working conditions in modern industry.

> Repeated analysis has by now demonstrated that the socio-economic context was indeed unfavourable to employees, and that the law in general served them just as poorly. Civil law at the time was principally a patrimonial law, guaranteeing the legal security of property owners. As for contractual freedom, the law could have no practical value except for someone who could refuse to be bound by a contract, which was certainly not the case for employees. [Translation][28]

In Canadian law there appears to be a lack of reconciliation between the atomized, individualistic vision of society, more particularly characteristic of civil law or common law, and the relatively more collectivist and communal vision inherent in part of public law. Each of these two visions is present and serves to counterbalance the other. This dichotomy often takes the form of a dialectic between the courts, which are guardians of the atomized vision, and the legislature, which introduces a more communal vision. Such a dialectic is once again particularly in evidence in labour law:

> At most, the approach of the courts allowed it to be demonstrated that, in practice, the law was unsuited to the new social and economic conditions. Further it may be seen that this characteristic of labour laws results from the relationship between the legislature and the judiciary. Since the task of the courts is not to make the law, but simply to state it, it should be no surprise that judges have been unable to adapt the law to social and economic circumstances. . . . The interpretation and application of new labour laws were made by the courts, circumspectly and conservatively. Generally speaking, the courts became the guardians of the legal system of the period; they argued that the new rules should be treated as exceptional measures, and thereby authorized a restrictive interpretation. Since then, there has been a continuing dialectic between the legislature and the judiciary concerning labour, with many of the amendments to labour legislation being only positive or negative responses to judicial decisions. . . . Even court decisions that were rather favourable to an individual employee were not really exceptions to the general approach, which has been fairly hostile to collective action. [Translation][29]

The capitalistic, atomized vision of law makes it difficult to consider the interests of society as a whole, as an entity. The concepts of *the public interest* and *the general interest*, when they are invoked, tend to be interpreted in an individualistic manner. The general interest is perceived as resulting from a convergence of particular interests. And these particular interests must be expressed in terms of a cost-benefit ratio. According to this logic, the costs for society as a whole, without specific reference to particular persons or groups, become an abstraction that the courts cannot recognize.

This is particularly evident in the problems addressed by jurists concerned with environmental law.

> It is futile to talk about the common law solving environmental problems when the doctrine and principles are so firmly embedded in the logic of cost-benefit analysis, especially an analysis that measures the environmental costs of a proposed activity only in terms of direct economic loss to the parties before the court, and assumes that the benefits reach almost every member of society. Not only are the principles wrong, but the process is fundamentally flawed. It limits access to those with an obvious economic interest in the outcome of the case; it puts the onus of proof on those who ask for nothing more than a sober second look; it demands a standard of proof that requires the plaintiff to exhibit a measurable and easily quantifiable deterioration in physical health; it is primarily reactive to problems; and it seldom offers more than financial damages to the successful plaintiff — damages calculated according to an amount required to compensate only the plaintiff for direct and measurable economic loss. . . .
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> . . . The law is firmly in the grip of the pro-development interests within society. Its focus on individuals means that it systematically excludes broader community interests, such as environmental values. It is inconceivable that the law could protect interests and values that have "no owner."
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> If these criticisms of the environmental protection laws suggest that there can be no legal solution whatsoever to the problems of pollution and inappropriate resource development, they have clearly gone too far. One fact is evident: we must, for the time being at least, work within the existing structure. Reform must start with incremental change to the present laws. Not only that, but there is much to commend the judicial process. . . . courts offer a forum through which individual concerns may be publicly aired and considered, a mechanism by which the decision maker is forced to focus on the rights and responsibilities of individual litigants, and an objectivity and independence resulting from the dispassionate look at a dispute on the part of a disinterested generalist. The judges' heightened awareness of the particular, as well as their theoretical position of independence, give them the opportunity to begin to fashion a new doctrine of "environmental stewardship." What is now needed is a clear message from the public that such a doctrine has widespread support.
>
> The best — indeed the only — way of communicating such a message is through legislation that clearly sets out society's expectations for the law, offering the judges, and ultimately the public, the necessary tools to fulfill those expectations.[30]

Here again we see the dichotomy between the individualistic vision held by the substantive law and the courts and a possibly more communal vision that the legislature may have.

In other areas, the tension is less, and the fragmented, individualistic vision is more generalized. This is the case with regard to the regulation of economic activity, particularly as concerns competition, its norms and controls.

> Canadian policy-making elites have never regarded monopoly or oligopoly as such to be a problem. Competition policy has not attempted to systematically eliminate the market power of leading industrial firms. The focus of state intervention has been on the conduct of the actors in a market rather than on the structure of the market itself. The goal has been to regulate the "abuse" of market power, while leaving the basic sources of that power intact.[31]

In the context of this policy, the Supreme Court has had the problem of defining what is to be understood by "abuse," but it has found itself in the classical dilemma of the liberal society, setting up an opposition between freedom and order. Its way out of this dilemma has been to adopt a very narrow, quite individualistic view of subjective law. This view may be summarized as follows:

> a legal right is a power absolute within a sphere but void outside it. Society is composed of individuals and institutions exercising dominion over such absolute zones of entitlement. In this universe, there is no overlap between the respective spheres of pure autonomy. The role of the jurist is simply to delineate the various zones of entitlement from each other. . . .[32]

It may be, however, that a fairly detailed analysis of the decisions of administrative tribunals would add another dimension to the picture. The fact is that these tribunals are much closer to the government and the collectivist intentions of the legislature than are the civil courts.

> To write a paper on administrative tribunals in large measure is to write a paper about government. This is so because many of the bodies that Canadians think of as administrative tribunals actually perform all the major governmental functions. . . .[33]

These tribunals are in a better position than others to hear representations made on behalf of the public interest. However, the representativeness of those who can and actually do make themselves heard before these tribunals is fairly limited.

> public interest representation, which is an expansion of those participating in the regulatory process, is not really public interest representation at all but the admission of new elites with special interests who can afford to participate.
>
> Participatory rights . . . are not a guarantee of regulation in, or even representation of, the public interest.[34]

The fact remains that it is conceivably in these tribunals that one would encounter a social philosophy more closely aligned to that of the technocrats and the legislature.

Capitalist society is also perceived by the law as being a representative and egalitarian democracy. The formal equality of citizens before and under the law is a fundamental principle of Canadian law. It is officially recognized in subsection 15(1) of the Canadian Charter of Rights and

Freedoms: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law. . . ." And subsection 15(2) recognizes that laws may be enacted to come to the aid of "disadvantaged individuals or groups" without going against the principle of equality before and under the law.

However, the fact that the law accords supreme respect to private property, the cornerstone of capitalist society, leads it to accept and recognize, without attempting to correct them in any fundamental way, the inequalities resulting from private ownership. The government and the Supreme Court have maintained the unequal nature of competition by not touching the large corporations, which have acquired sufficient economic power to make them into superpowers.[35] In labour relations, this respect for the owner's property rights results in the legal sanction of the basic inequality between the owner of a company and those whom he hires to work in it:

- the employer remains free to choose his position, means of production, and organization;
- ownership of the enterprise and results of its activities remain strictly the employer's concern; . . .
- the employer's prerogatives of freedom of management are not directly called into question. . . .

> Thus it can be seen that ownership, accession, free enterprise, and the law of supply and demand are still foundations for the organization of economic activity, and were in no way questioned by the labour laws governing collective bargaining. . . . For the same reason, this system of collective labour relations has never altered the employee's status in the enterprise: the employee is still legally an outsider, a sort of non-citizen. [Translation][36]

The concept of the collective contract was intended to offset this inequality to some extent, but it may also be seen as a way of obscuring the fact that this contract is concluded between an owner whose property rights give him the prerogatives listed above, and employees who must recognize these prerogatives, which they do not share, even if they happen to have "belonged" to the company much longer than the employer has owned it. In their study of Kahn-Freund's work on labour law, Paul Davies and Mark Freedland state:

> It is a profound error to establish a contrast between "society" and the "state" and to see one in terms of coordination, the other in terms of subordination. As regards labour relations that error is fatal. It is engendered by a view of society as an agglomeration of individuals who are coordinated as equals; by a myopic neglect or deliberate refusal to face the main characteristics of all societies, and not least of industrial societies, which is the unequal distribution of power. The law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts as concluded between equals. This may partly account for the propensity of lawyers to turn a blind eye to the realities of the distribution of power in society.[37]

In the view of Canadian law, society is basically composed of responsible persons. The concept of responsibility is at the root of the legal definition of the person or citizen. This concept has been particularly enriched in the past few centuries under the influence of liberal bourgeois ideology.

But there are categories of citizens who for various reasons are not capable of fully assuming their responsibilities and who need assistance, protection and support. The growing recognition of this need for protection and assistance has resulted in a mass of legislation in the sphere of public law, in the areas of health, welfare and the family.[38] There are also protection schemes that apply not merely to one or more categories of citizens, but to all citizens on a universal basis: for example, protection of human rights, consumer rights, rights of landlord and tenant.

In his study entitled *Justice in the USSR*, Harold Berman uses the expression "parental law" to characterize the spirit of Soviet law.[39] The purpose of such law is twofold: (a) to protect citizens who are particularly disadvantaged and who require special attention; and (b) to educate new socialist citizens and instill in them the values of the new society in which private property and social classes are supposed to disappear.

The same expression, in both senses that Berman has given to it, can also be applied to a large part of the Canadian law. Many laws have a protective function. For example, much of the history of labour law is concerned with this function, insofar as it has sought to correct the economic and social inequalities between employers and workers by establishing and regulating a bargaining process and by attempting to achieve a fairer distribution of the benefits of production.

Family law offers an interesting case of oscillation between spousal responsibility, in the spirit of civil law, and the protection to be granted to such as single mothers and children. Ultimately, family law leads into social law.

> Constructive reforms can, no doubt, alleviate some of the adverse effects of the present private law system of spousal and child support. . . . But such changes, though important, will not redress the real problem of many Canadian families who encounter poverty in consequence of the breakdown of the marital relationship. A statute-based judicial system that provides for the equitable distribution of property on marriage breakdown and for the payment of reasonable spousal and child support is of no consequence to those who have no property and whose income is insufficient to support two households.
>
> . . . it is impossible to ignore the present and prospective role of the state in subsidizing the needs of the financially disadvantaged. Social assistance, guaranteed income and pension schemes, family allowances, old age pensions, vocational training and affirmative action programs, state-subsidized child-care facilities, and taxation laws all contribute to family policy and

have a potentially significant impact on the private law system of income support for family dependants.

In reality, there is a dual system of income support for family dependants in Canada: the "family law system" regulates the obligations of the family members to one another; the "welfare system" regulates the financial responsibilities of the state. These two systems differ in origin, substantive provisions, administration and orientation. The relationship between them has not been adequately explored in Canada.[40]

It is clear that these two systems are distinct inasmuch as they are the product of two different visions, one relating to the individual responsibility of the couple and spouses, and the other relating to the protection that the state must provide them.

The vision of a country whose citizens enjoy freedoms has gradually been widened and deepened in Canadian law. It is expressed with particular clarity in the Canadian Charter of Rights and Freedoms. But this vision is not a simple one, in that the law also perceives society as needing to be regulated, with law itself being one of the principal instruments of such regulation, although not the only one.[41]

A fundamental problem is the limit to freedom necessary in consideration of the requirements of life in society and the freedom of others. This is the problem that John Stuart Mill tackled in *On Liberty*, in which he tried to reconcile freedom with the needs for regulation of life in society. It is the same problem encountered by law in areas such as competition in trade, the environment, and urban law. It does not appear that Canadian law has been able to clarify this dilemma without sacrificing one pole or the other. It is the life-in-society pole that is generally sacrificed. Thus, an analysis of Supreme Court decisions in economy-related cases concluded as follows:

In essence, the Court has sought to deny that there was an irreducible conflict between freedom and order. Certain forms of conduct are banned absolutely, no matter how beneficial the consequences. At the same time, other categories of conduct are absolutely permitted, no matter how harmful they might be in a particular instance. The jurist resolves disputes by classifying the conduct in the appropriate category rather than by maximizing social utility.[42]

If the problem is solved by denying its existence, such a solution is certain to be detrimental to social or communal considerations. It would be necessary to explore other areas of activity in order to determine whether the courts, and the Supreme Court in particular, adopt as flexible a viewpoint in these areas. But there is not certainty that such is the case, given the extremely individualistic view of society embodied in Canadian law.

In Canada, the regulation of society by law is thus still deeply marked by the old liberal individualism. It may be noted that many social policies, inspired by a more socialistic view, are often more effective.

This has been evident with respect to urban policy, environmental protection, policy on the family, and consumer protection. A certain political will is expressed, but little action is taken. The law's individualistic view of society, while not the only explanatory factor, can perhaps offer some indication as to why policies that might be called "social" in a general sense have so little impact.

Society as perceived by law may be described as "moderate" or "balanced" from an ideological standpoint. It is a society in which extremism of any type has no place. It is governed by "good sense," "common sense" and pragmatism. It is in the interest of citizens to agree, negotiate and settle their differences in a "reasonable" manner. Understanding their interests, they generally act in such a way as to minimize conflicts and maximize their well-being. Where necessary, compromise, which brings conflicting interests into balance, is always preferable to an interminable struggle. Even the courts, which must definitively settle disputes, finding one party to be in the right and the other in the wrong and granting to one what they cannot give to the other, nevertheless tend to project this image of compromise, insofar as the pie can be sliced in such a way as to give some satisfaction to the party that is not favoured.

This observation could be illustrated in many ways. I shall choose the sphere in which extreme ideological positions would have the greatest chance of flourishing: the political sphere. An analysis of four reports of commissions charged with proposing legal reforms offers the following description of the "typical intellectual and ideological attitudes" of these bodies: "political values are taken as a non-debatable given in a society that resolves conflict pragmatically, and by consensus."[43]

Resolution of conflicts pragmatically and by consensus is part of the culture of a country such as Canada, almost of necessity. The vastness of the country, the economic importance of its regions, the ethnic and linguistic duality of its founding peoples, to which has gradually been grafted a multiculturalist definition — all these are factors that have given a central place in Canadian culture to pragmatism and the constant search for, and the respect for, consensus. In Canada, the idea of compromise does not have the pejorative sense that it may have in other cultures, such as the United States, where the acceptance of a compromise is generally interpreted as an implicit recognition of defeat. For Canadians, compromise is the normal outcome of any negotiation, since it is successful only insofar as all the parties make reciprocal concessions.

At the time of the American Revolution, and at other points since then, Canada has opted for colonial status within the British Empire and then the Commonwealth. In this framework, the evolution of its political status toward independence has occurred smoothly, without jolts. This gradual and evolutionary progression may be described as essentially pragmatic.

This pragmatic attitude and preference for consensus are reflected in the jurisprudence of the Supreme Court in constitutional matters. A study of 90 Supreme Court decisions on the distribution of powers between the federal government and the provincial governments since World War II concluded as follows: "42 decisions [were] favourable to the provinces (or unfavourable to the federal government) and 48 decisions favourable to the federal government (or unfavourable to the provinces)" [translation].[44]

A more detailed qualitative analysis of these decisions leads the author to show how the Supreme Court was guided by the objective of securing and maintaining cooperative, balanced federalism:

> Much may be said in favour of the theory that interjurisdictional conflicts in Canada are basically political and that they should be solved in the political arena. . . . The Supreme Court has shown itself readily available to act as an umpire in this area, but at the same time its jurisprudence demonstrates clearly that, to the maximum extent compatible with the Constitution, it has wished to encourage federal-provincial cooperation as a means of solving political problems.
>
> On a technical level, the Court has recognized the validity of legal mechanisms that are perfectly suitable to assuring such collaboration as the two levels of government wish to establish between themselves. . . . At the substantive level, the Supreme Court's decisions have tried to increase the points of connection, and the Court has demonstrated sympathy for cooperative federalism. [Translation][45]
>
> . . . the Supreme Court has succeeded since 1945 in maintaining a balance of legislative powers comparable to that existing previous to that date. This balance is not perfect equality. It is part of a system that contains a bias in favour of the federal authority but also includes compensating mechanisms to prevent irremediable centralization. [Translation][46]

While this concept of balanced federalism, with the balance nevertheless weighted in favour of the central government, was inherited by the Supreme Court from the Privy Council, it was not only in the spirit of continuity that it chose to preserve this heritage. The justices of the Supreme Court were undoubtedly anxious, as were the leaders of Canada throughout this entire period, to see Canada acquire the image of a sovereign power on the international level. For this it was necessary for the central government to be given the authority and the recognition necessary for it to take on the role and the position to which it aspired within the community of nations.

> The Supreme Court has . . . never repudiated the classical form of federalism inherited from the Privy Council, nor has it ever promoted the centralizing model of federalism the critics of the imperial court expected it would. . . . if the Court has been more generous toward the federal power, it is not because of a changed perception of the internal workings of federalism, but rather because of its conception of what Canadian sovereignty requires at the international level. [Translation][47]

This concern for Canada's international role, which was to be secured by the central government, perhaps explains in part why the claims of Quebec, the main proponent of a more decentralized concept of Canadian federalism, found little support in the Supreme Court. A particularly detailed analysis of the influence that Quebec concepts of Canadian federation may have had on Canadian constitutional law can lead only to the following conclusion:

> Generally speaking, and in spite of the exceptions, the body of constitutional thought current in Quebec during the period studied [1945–85] had no influence on the changes that occurred in the substance of Canadian constitutional law. . . .
>
> But in the other areas of contention — limiting federal jurisdictional claims to the 1867 Constitution (let alone changing the distribution of powers to benefit the provinces), recognizing the language rights and collective cultural rights of francophone Quebeckers, or changing federal institutions to make them more impartial and more representative of regional differences — Quebec political thought encountered nothing but failure. Thus, in Canadian constitutional law there was to be no recognition of the dual nature of Canadian society or of special status for Quebec, nor any acceptance of a more decentralized form of federalism. [Translation][48]

This outright rejection of Quebec's decentralist claims clearly illustrates the Supreme Court's concern for maintaining a balance weighted in favour of the federal government and for promoting the latter's international role. However, it is also interesting to compare the political contexts in which the decisions of the Supreme Court have been unfavourable to Quebec's claims with those in which they have been favourable.

> [The] varying positions on the question of the distribution of powers met with varying success. We are sorry to note that their effect increased with their radicalism and was greater the less legitimate their basis. In fact, the periods when the claims asserted were the most modest (the status quo under Duplessis and cultural and social sovereignty under Bourassa, bodies of thought one might consider to be minimalist for their time) coincided with the greatest setbacks in the area of the distribution of powers. . . .
>
> On the other hand, the political ideas that made their mark on constitutional developments were put forward by the governments that made greater demands in the area of provincial jurisdiction, and whose claims may have seemed like the lesser evil in relation to those of an even more radical and less legitimate opposition. . . .
>
> The distribution of powers in the Canadian Constitution changed in the directions seen as desirable by the dominant ideologies in Quebec when their proponents were able to establish a sufficient balance of power. [Translation][49]

Here again we see the pragmatism noted above, a characteristic trait of Canadian culture. The Supreme Court, without departing from the objectivity in which it habitually cloaks its decisions, would seem not to

have been indifferent to either the forces in play in the political arena or the impact of its decisions on the balance of power between the various governments within the country and on Canada's international role. In its role as an arbiter, the Supreme court appears to have wanted also to act as a peacemaker.

> In fact, its role, and the role of law administered under its auspices, was to maintain the balance of political powers on viable axes. That is why the Court has never provoked major controversy. . . .
>
> . . . By a delicate rearrangement of the relationships between exclusiveness and concurrence of federal and provincial powers within a system of relative equilibrium, it relaxed the rules of the political game then in existence. By encouraging intergovernmental cooperation, it further increased the possibilities of adaptation within the status quo, which it seemed determined to maintain. [Translation][50]

It would thus seem that one could validly conclude that judges share with politicians, and probably the majority of Canadians, the same perception of a society in which preference is given to non-extremist ideologies and moderate positions, the balancing of interests and forces, the negotiated settlement of disputes, and compromise rather than confrontation.

It is impossible to say to what extent the vision of society outlined above is shared by the Canadian people as a whole. In reality, law, whether it be the law developed by the legislature or the law interpreted by the courts, is the work of elites. A more radical analysis would speak of class law: law expressing the interests and ideologies of the ruling class. Without being false, radical analysis may sometimes tend to overgeneralize and oversimplify. But at the same time it has the merit of emphasizing that law is the product of a segment of society, rather than society as a whole. It is often said that law reflects the values of a society; but this view of law is itself a product of legal ideology. In reality, law reflects the values of a society as these values are perceived and interpreted by a ruling class, or by a segment of a class, or by different elites that, despite divergent interests, agree on the general definition of the society and on certain "strong" values that may be considered by all as obvious and indisputable.[51]

These elites are mainly of three types. First there is the elite that holds economic power, and which generally lobbies the legislature powerfully and effectively.

> . . . the presence of an imperfect but increasingly sophisticated business lobby . . . has managed to shape the timing and direction of consumer policy making in Canada for decades. Although we have not yet reached the stage of American-style "political action committees" that appear to be a growing part of the business lobby scene in the United States, we have had our share of clearly business-directed "legislative decisions." At the federal level, the strength of the business lobby ensured the failure of the proposed

> amendments to our competition law, of suggestions to redesign federal regulation of advertising, of the federal proposal for a comprehensive borrowers and depositors protection law. And at the provincial level, the design or the delay in implementation of virtually every major consumer initiative has been directly influenced by business reaction: from truth-in-lending to trade practices to consumer production warranties to class action reforms. In each of these areas, the role of the business lobby has been a significant one.[52]

These observations apply not only to the field of consumer law, but also, with minor changes, to many other areas of legislation in which financial or economic interests are in play: for example, urban planning, environment, labour relations, competition, and social law.

> To appreciate the centrality of corporate decision making in the economy is to appreciate the special place that the corporate executives have in government, a place that no other interest group can begin to approach. It is more than just power that opens the doors of deputy ministers and cabinet ministers to senior executives, that causes heed to be paid to the pronouncements of the Business Council on National Issues, the Conference Board of Canada and the Canadian Manufacturers' Association. It is the realization by members of government that business must be accommodated if the government of the day is to succeed.[53]

Because of both the influence that the large corporations as a group exert on the economic life of the country and the control that they exercise over the Canadian media, which they largely own, they have a special line of communication with any government; they have as much influence on the campaign platforms of the major parties as on legislation and the decisions taken by the executive arm of the government.

A second elite consists of politicians and senior public servants, although in a more detailed analysis, the former would be distinguished from the latter. By the nature of their duties, politicians and senior public servants are more sensitive than the economic elite to the need for social programs. They are subject to the pressure of public opinion, the news media, and various lobbies favourable to such programs, and this pressure may stir them to action. However, they are always divided between the pressure in favour of social measures and pressure from the economic elite; they seek what they believe to be the golden mean that will satisfy both parties.

A third elite consists of the various professional bodies. When legislation that may affect them is being considered, they are able, because they tend to be well organized, to assert their interests, and in so doing they generally claim to be acting in the public interest and for the common good. In the development of law (to say nothing, of course, of the implementation of law) one professional group has been and continues to be predominant; namely, jurists:

> A . . . uniquely Canadian ingredient in the formulation of consumer protection legislation has been the enormous reliance by federal and provincial legislators on one narrow group of academic specialists — law professors — for purposes of both problem identification and appropriate legislation design. . . . our history in law reform has been a history of lawyer domination, as confirmed by the design of law reform agendas and resulting legislation. Indeed examples of the continuing influence of this legal-academic, judicial-doctrinal mindset in the formulation of law reform agencies abound.[54]

The predominant role of jurists is, of course, understandable: in Canada, law is fairly generally considered as their exclusive concern. To be sure, this may be changing as the more seasoned politicians, public servants and administrators succeed in limiting to some extent the influence of jurists. At the same time, the proliferation of law, often decried by jurists themselves, constitutes a solid base for the maintenance of their authority and influence.

Conclusion

In the last part of this study, I sought to identify various features of the vision or perception of Canadian society that is conveyed by the law, as well as the contradictions that the law may also convey through its vision of Canadian society. We have seen that the law, not only as developed by the lawmakers but also as interpreted by the courts, relates closely to the Canadian culture and the power relationships within Canadian society. The questions that arise, then, are the following. If there is a certain convergence between law and culture in Canadian society, is it because law reflects the culture or because it influences it? Is the law a mirror of society, or does it play a role in moulding that society? Is law passive or active?

There is a general tendency, particularly in the social sciences, to consider law a reflection of the culture, intellectual currents, ideologies, and power relationships of a society. This probably explains why contemporary social sciences have greatly neglected law. They have too readily concluded that law follows behind reality because it registers it a posteriori. Thus, according to them, law is not a part of ongoing social change; rather it is associated with *completed* social change which might almost be said to be frozen in law.

While this concept of law is not false, it is incomplete. It is true that in and through the legal system, law, or at least a part of the law, serves to institutionalize existing situations and completed changes. It is also true that law, inherited from a sometimes distant past and slow to change, can be out of step with current realities. It is not difficult to find examples of this. Thus it was only recently that the legal status of women was changed to make it correspond better to aspirations long expressed by

numerous feminist movements, and to bring it more into line with changes in thinking and attitudes.

Such a perception of law, however, ignores its active role in society and underplays the dynamic contribution that law makes and can make to the various spheres of social life. This active role of law is manifested in various ways. First, it may be seen in changes instigated by lawmakers. The latter occasionally pass legislation that is explicitly intended either to transform a situation or to move attitudes in a given direction. By no means all Canadians were in agreement, and a majority still are not, with the act to abolish the death penalty or the act recognizing homosexual relations between consenting adults when these pieces of legislation were passed. As to the courts, they too are quite aware of influencing the evolution of society in a given direction when they hand down various decisions.

Furthermore this dynamic role is not confined solely to the functionaries of law. The law-related activities of ordinary citizens, particularly in the contracts they conclude with each other, also contribute to this active dimension of law in the evolution of situations.

The answer to the question raised above is thus clear. While law is undoubtedly passive and a mirror of the society and its culture, it is also an active agent, an intervenor, a driving force in the organization and evolution of a society, particularly in modern societies in which the state and law have come to play a predominant role.

It may be said, indeed, that it is within a framework of law that political power is exercised. It is law, moreover, that gives political power its real effectiveness. Any policy, be it economic, social, scientific or cultural, must, if it is to pass into reality, be expressed in the form of acts, regulations, ministerial directives, budget guidelines, and so on. Law is thus the effective formulation of policy.

It is therefore no exaggeration to say that law is the most effective of all the social and human sciences. In structuring and regulating the economic and social relationships that form society, law exerts considerable force. It is not merely repressive or normative; it is also active.

To the extent that governments wish to develop and apply economic policies and participate actively in economic development, their primary tools for action are acts, regulations and standards. Law is inherent in any economic policy; it is the channel through which the policy must pass. If it is not the law of the legislature, it is the law of the courts, or what might be termed "infralaw," that is, paralegal regulation instituted by the professional bodies concerned.[55] Any policy, be it explicit or implicit, involves objectives to be attained, means of achieving these objectives, and consequently, at least minimal rules to be observed.

All the legal studies carried out under the auspices of this Commission have rightly emphasized the links between law and society, the power relationships that influence law, and the impact of law on the power

relationships within society. This interweaving of law within the economic and social fabric, now increasingly recognized, gives law a special status, and anyone rethinking economic policies needs to understand the social and economic scope of law in relation to ideologies, culture and social structures. For whether policy makers make explicit use of it in formulating policies or whether they instead leave it to social forces to regulate themselves, the law, in a formal or informal sense, is always present and active. To ignore it is to ignore both a social force and an agent serving to regulate social forces.

As described earlier, this effective power of law is further supported and augmented by its mythical dimension and by its ideological function. Inasmuch as law may be considered the expression of strong values (justice, equality, social order, and rationality), it is vested with authority, wisdom, and objectivity, which serve to maintain and reinforce its power to act on society. Even efforts to demythicize law draw on the same strong values that contribute to its mythicization, and therefore they too serve to enhance the prestige of law — at least ideal law, if not actual law.

Contemporary societies, more than any others, have exalted law. This is the heritage of the two great revolutions of the 18th century, the American Revolution and, even more importantly, the French Revolution, themselves in part heirs to England's "Glorious" Revolution of 1688 which had foreshadowed them. In France, particularly, the purpose of the revolution was to replace the societies of the Ancien Régime with a society in which liberty, equality and the authority of the state would be truly rooted in law. The law was intended to replace the arbitrariness, oppression and inequalities of the Ancien Régime.

Such exaltation of law is not without certain ambiguities, however. As we have seen, law may be the object of both mythicization and demythicization — at the same time, in the same society, at the hands of different groups. More importantly, the dynamic between the mythicization and demythicization of law is characterized by wide swings of the pendulum. Thus, in the 1960s and early 1970s we saw a period of strong emphasis on the law, particularly as enacted by the lawmakers, to settle a mass of problems. Following this period of confidence in the law, the pendulum swung in the opposite direction: in the 1980s there is much criticism of the excess of law passed during these decades; and questions are being raised as to the actual effectiveness of many laws and regulations and the merits of others. There is concern regarding the unexpected and sometimes seemingly unfortunate consequences of having too many laws and regulations.

During such a period of demythicization, governments are reluctant to turn to law as an instrument of economic policy, preferring to put their faith in the "laws" of the market, as if these laws were in no way comparable to law as such. While we would not deny that the desire for

deregulation may have positive elements, it is important to recall that it is not without its share of illusion, in that such deregulation will of necessity only open the door to other, less formal types of regulation, which carry with them drawbacks of their own along with a measure of ideology, inasmuch as the desire for deregulation is a product of neo-liberal thinking, which, in recent years, has made great gains.

Notes

This study is a translation of the original French-language text, which was completed in May 1985.

1. This distinction between macrolaw and microlaw was suggested to me by Ivan Bernier.
2. Hans Kelsen, *Théorie pure du droit*, French translation by Charles Eisenmann, based on the second edition of *Reine Rechtslehre* (Paris: Dalloz, 1962).
3. On the work of F.K. von Savigny, see Julius Stone, *The Province and Function of Law* (Sydney: Associated General Publications, 1946), pp. 421–48; Hasso Jaeger, "Savigny et Marx," *Archives de philosophie du droit* 12 (1967): pp. 65–89; Jean Gaudemet, "Histoire et système dans la méthode de Savigny," in *Hommage à René Dekkers* (Brussels: Bruylant, 1982), pp. 117–33.
4. On Marx and Engels' analysis of law, the reader may also consult Maureen Cain and Alan Hunt, eds., *Marx and Engels on Law* (London: Academic Press, 1979); Paul Phillips, *Marx and Engels on Law and Laws* (Oxford: Martin Robertson, 1980); Piers Beirne and Richard Quinney, eds., *Marxism and Law* (New York: John Wiley, 1982).
5. Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954).
6. Max Weber, *The Theory of Social and Economic Organization*, translated by A.M. Henderson and Talcott Parsons (Glencoe, Ill.: Free Press, 1947), p. 328.
7. As examples only, chosen from many others, Alan Hunt, "Max Weber's Sociology of Law," in *The Sociological Movement in Law* (London: Macmillan, 1978), chap. 5; S.L. Andreski, "Understanding, Action and Law in Max Weber," in *Sociological Approaches to Law*, edited by Adam Podgórecki and Christopher J. Whelan (New York: St. Martin's Press, 1981), pp. 45–66.
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4

Law and Values

LIORA SALTER

Introduction

The papers on legal issues prepared for the first part of the legal research for the Royal Commission on the Economic Union and Development Prospects for Canada (Volumes 46 to 51 inclusive, see Appendix) all examine law and legal institutions in terms of value questions. Their authors might have chosen to write differently, providing an analysis of specific laws, for example, or following the approach of the Law Reform Commission more closely by concentrating on the development of highly specific recommendations. Instead, they address quite basic questions about how laws and legal institutions are and should be designed.

Their authors raise some familiar questions about how interventionist a government is and should be in various areas of law and regulation, and to what degree and ends law should control corporate behaviour, or protect the consumer and the environment. The papers also challenge currently popular ways of viewing these questions and the policy options that are seen to follow from the usual answers. They set out a series of choices for public policy. Some of these choices are basic ones. The authors ask about the appropriate role of governments and about the allocation of the costs and the benefits of any public policy. Other choices concern administrative matters. To what extent, the authors ask, should governments rely on self-regulation, or an adversarial process or increased consultation to achieve their public policy goals?

Law and policy always embody value choices. If these value choices can be made explicit, they can aid in developing a framework for some innovative policy recommendations. The task of this paper is to identify

a workable concept of values for use in policy making. It is to discuss how law, values and public policy are related in such a way that the studies done in the first part of the legal issues research for the Commission are conducive to the development of policy recommendations. The paper includes: (1) a general discussion of the relationship between law, values and public policy; and (2) a discussion of some specific policy options and value choices. The raw material used for the analysis has been taken from only the papers from the first part of the legal research prepared for the Commission, and the goal is a synthetic analysis that will make it easier to determine what the policy choices are, given the conclusions of the researchers.[1]

The first section of this paper presents the results of the legal research studies in the form of two related public policy debates. The use of a debate format to present the legal research conclusions was made necessary by the broad scope of legal research done for the Commission and by the variety of conclusions drawn by the legal researchers. Casting their research as if it constituted a position in policy debates allows this author to locate the common themes in all the legal research. It permits the development of a synthetic analysis from the widely divergent legal research materials.

The first debate is between the legal researchers and a group of industrial hygienists who held their initial meeting of a committee on law and ethics in June 1984. The hygienists' views were chosen to act as a foil for the conclusions of the legal research for several reasons.[2] First, as members of the American Conference of Government Industrial Hygienists (ACGIH) their task is to set standards for occupational health and safety. In their standard-setting activities, the hygienists deal directly with the relationships between law, values and public policy, the subject of this paper. Unlike the legal researchers, however, they deal with these relationships at a practical, not a theoretical, level. Second, ACGIH members have experience with many of the reforms being proposed by some of the legal researchers and in the policy debate in Canada. Their more general views of the relationships between law, values and policy are informed by their experience with, for example, different models of self-regulation. Third, members of ACGIH also have a professional association (the American Industrial Hygiene Association) and, as part of that association, a code of ethical conduct. The discussion of law and ethics at the ACGIH meeting, then, is not, strictly speaking, a discussion about whether another professional code of ethics is needed. Broader questions about the relationship between ethics and ethical codes, law and values are considered relevant and discussed. Again, the legal researchers, like the hygienists, deal with issues concerning ethics and ethical codes, personal and social values and law and regulation. A comparison of the two approaches — the legal researchers' and the hygienists' discussions of law and ethics — is thus informative.

The second debate offered here is between the legal researchers and one variant of economic theory, public choice theory. The purpose of presenting the public choice option is that it is commonly accepted, though not always well understood, by many policy makers in North America today. In the format of a debate, it is possible to provide a fairly comprehensive explication of the tenets, values and assumptions of public choice theory. It is possible to contrast these assumptions with the historical and empirical conclusions of the legal research. It is, however, important to note that some of the legal researchers would subscribe to a modified version of public choice theory. As a consequence, the debate between public choice theory and the legal research is not intended to express a necessary philosophical divergence in the two approaches. Rather, the legal research (whatever the philosophical commitment of the individual researchers) raises questions primarily about the empirical and historical claims made, usually implicitly, by the variant of public choice theory described here. If the empirical and historical data are to be taken seriously, as they must in any practical discussion of policy, either public choice theory must be adopted to correspond better to the empirical realities of policy making, or alternative approaches to public choice theory must be found.

In the second major section of this paper, these two debates are left aside. The legal research concludes that the relationship between law and values is highly complex and inherently responsive to social conflict and change. The researchers argue that there are and have been a number of different but equally legitimate expectations of law and policy. They conclude that any program of policy recommendations must be tailored to the variety of expectations of law and regulation, and that the many different legal and administrative procedures that now exist are, in fact, relatively well adapted to meeting a complex body of needs.

After an analysis of the two debates, the question remains, then: how are these various needs to be met? Are some approaches more suitable under some conditions than others? The purpose of the second section is to provide some preliminary answers to these questions and a framework for a continuing discussion. Three specific expectations of law and policy are identified. They are: law and regulation as a "safety net"; law and regulation to affect the quality of life; and law and regulation as instruments of resource redistribution. Each expectation embodies some value choices and not others. Each is likely to succeed (or fail) under some conditions and not others. In specifying these conditions, the conclusions of the legal research can be reoriented to provide a specific guide to the development of policy recommendations.

Finally, some definition of terms is essential. For convenience, "law" refers to laws, the actions of the courts, regulations and specific public policies. All involve "law" as traditionally defined, and all are carried out through various legally mandated institutions. The purpose of this

inclusive definition of law is to permit comparisons between the way "laws" as traditionally conceived are used by various legally mandated institutions and comparisons between the institutions themselves. When only one of these types of lawmaking or legal institutions is being discussed, it is clearly specified in the text.

The term "values" refers to ethical values. Values include the constellation of beliefs in our society, their intellectual justification and their often ideological presentation. It is assumed here that values are simultaneously held by individuals and reflective of the society in which they develop. The relationship between ethics and values is troublesome because lawyers, at least, tend to associate ethics with the codes of behaviour adopted by various professionals. In the discussion here, "ethics" is considered in terms of its broader meaning, as a form of values relating to decisions about "right and wrong" conduct. If reference is also being made to the ethical codes adopted by various groups, the distinction between "ethics" and ethical codes will be noted in the text. In all cases, ethics should be regarded simply as a synonym for at least one type of values.

Differing Views of Law and Values

It is quite common to talk about "value choices," particularly in environmental law or in discussions about regulatory reform. What is meant by value choices depends on the context of the discussion, on those talking and on the positions being advocated. The variety of definitions of "value choices" is broad. For example, environmental groups will often argue that a discussion of ethics should precede an environmental assessment, while others argue that values cloud a rational assessment of issues and interests, and the political calculus necessary for the development of public policy. Another view is that all law embodies value choices and, indeed, that law is itself a value. Social scientists often take this argument further, suggesting that even science and technical knowledge are value-inbued. Of course, most scientists and engineers, like most lawyers and judges, see their work as value-free. Finally, some people consider that value choices are made by individuals; others speak extensively about social or collective values that are embodied in the cultural fabric of any society.

The discussion that follows focusses on one of these views to explore what the legal research can contribute to a discussion of law and values. The views of a new committee on law and ethics created at a preliminary meeting of the American Conference of Government Industrial Hygienists are chosen to serve as a foil for a discussion of the legal research. ACGIH committees generally set standards for occupational health and safety that either are adopted or have influence in virtually all jurisdictions in the Western world. Most ACGIH committees deal with

the assessment of "physical" and "chemical" agents in the workplace as a basis for the development of standards. The law and ethics committee is a break from past practices in that it is oriented to general public issues rather than specific standards or problems in the workplace.

Often, particularly in standard-setting bodies other than ACGIH, standards are called "consensus standards" because they are developed by committees whose members are chosen to represent different interests. Any standard, based on consensus or not, involves both an assessment and a negotiation of interests. But standards set by bodies like ACGIH are only guidelines for action. They are set initially without regard for whether they will be adopted or enforced, except insofar as practical problems of implementation are considered.

Standard-setting bodies like ACGIH are private organizations, and members of the committees are volunteers. In their professional capacity, however, ACGIH members may be responsible for developing regulations from standards (as staff of the U.S. Occupational Safety and Health Administration or the Ontario Ministry of Labour, for example) and their implementation and enforcement. Thus their views are important because they deal regularly with the practical aspects of the relationship between law, values and policy, and with value choices, law and regulation.

The Practitioners' View

In their first meeting, at least, the members of the newly formed ACGIH Committee on Law and Ethics seemed uncertain about their mandate. They did make a clear distinction between law and ethics, however. Ethical decisions are necessary, they believed, when laws are silent with respect to appropriate conduct. Conversely, laws are required when codes of ethical conduct fail. In their view, ethics and law are substitutes for each other, and ethical or value decisions are highly individual, represent personal choice, and are made daily in the conduct of employment. Law, on the other hand, is value-neutral, or at least disinterested and impersonal.

Law, they suggest, overrides personal ethics. But law, as such, is an instrument of last resort, an indication that personal values and ethical codes have failed. All industrial hygienists have experience dealing with problems of risk in the workplace, but do not view law in terms of workplace relations. Rather, they view it as intrusive. When subject to laws, both employees, including the industrial hygienists, and employers become defensive. They turn their attention to how to deal with legal issues, rather than to health and safety issues at hand.

It is important to remember that industrial hygienists are professionals who work as middle management, although they deal with workers' health and safety daily. They may negotiate with union stewards and talk

directly with workers on occasion, but much of their job involves discussions with senior management about the budget and resources that will be allocated to safety and health equipment, to the implementation of standards on the job. The risk provoking a demand for a committee on law and ethics in ACGIH, therefore, is not the risk to workers in particular, but a risk that hygienists newly face on the job. It is the risk they face of being sued, of liability for the judgments and decisions they make.

Changes in negligence law, and an increasingly litigious American population, have altered the working environment for the hygienist and for those who set standards. For the first time in their history, hygienists are potentially involved in actions taken through the courts. They have viewed ethical codes, and their own personal values in fulfilling the responsibilities of their employment, as the first and best defence against liability claims. They know that they may now also need access to the legal system to protect themselves. Their concern over law, not ethics or values, is at the root of their newfound formal interest in law and ethics. This concern exists despite the protection offered to hygienists through the professional code of behaviour of their professional association rather than the ACGIH.

Their view of the relationship between law and values, then, sets laws and values in opposition to each other and law, in some sense, as contrary to the public good. But law is distinguished from regulations that may serve as an adequate means of implementing and enforcing standards. An extension of criminal law sanctions (combined with consensus standards) might well increase the burden law imposes on hygienists, although it would result in apparently less regulation. Thus, when they stress the coercive nature of law, it is law, not regulations, that is the subject of their concern.

Some hygienists may suggest, of course, that a voluntary and privately operated system of setting standards is preferable to government regulation. Their view of law as intrusive, however, does not lead directly to a proposal for regulatory reform. It is linked to the legal remedies offered to individuals (and companies) seeking recourse (and rewards) through the court system. If consensus standards were accompanied by criminal law sanctions, the result might be a greater burden of law for the practitioners of standard setting and enforcement. From the hygienists' perspective, law seems to operate as a closed system. Legal remedies create the need for more legal remedies (and more lawyers), and undermine the decisions (personal, ethical and even regulatory) that individuals make in the workplace.

The Response of the Legal Research

Many of the researchers in the first part of the legal research for the Commission (Volumes 46 to 51 inclusive) would agree with some aspects

of the practitioners' view of law described here. They have demonstrated through their work that legal remedies beget more legal remedies, that new law tends to generate a demand for further legal action. On the basis of their studies, they would accept the premise that the orientation of much judicial process is defensive, and that a judicially oriented legal system potentially draws attention away from the issues at hand into issues of negligence, liability, fault, and concern for due process. From such a perspective, law and ethics are different, since ethical decisions (and even ethical codes) are usually task-oriented. Like the hygienists, the legal research argues that law can be highly intrusive in the resolution of disputes that are sometimes best left to those with direct experience in the conflict at hand. On other issues, the legal researchers would question or challenge the practitioners' view.

The Nature of Law

The distinction made by the hygienists between law (a judicial process) and regulations (an administrative process involving standards) would be partly supported from the legal research. A critique of law as a judicial process need not necessarily be tied to proposals for regulatory reform. At the same time and in contrast to the views of the hygienists, however, the legal research indicates that there are many types of legal and regulatory institutions. The researchers find that law shades into regulation and vice versa, depending upon the degree of formal or informal discretion exercised and the procedures adopted in each case. Courts, for example, vary in their approach to issues and the degree to which they depend upon highly judicialized modes of determination. Similarly, regulatory agencies may be more or less judicially oriented, more or less interventionist in approach, more or less explicitly tied to a legislative process, and more or less limited in their definition of the public interest. Any generalized picture of the judicial or the regulatory process misses the many important differences in the way different courts and different agencies exercise their authority and make decisions.

The commitment to what might be called "a legal pluralism" evident in the legal research can have both normative content and a theoretical basis, but the legal researchers ground their analysis primarily in an empirical and historical description of the law. For example, Monahan argues that even a single court like the Supreme Court will follow different principles over time in determining jurisdictional cases. The Court decides differently at different times, he argues, because no one approach can appear sufficiently responsive to all the facts and pressures, or indeed the political value choices, that the court legitimately must take into account. At least two concepts of Canada as a nation-state must inform the court's decisions and are used, more or less successfully, as a basis for the Supreme Court's decisions.

In many areas of law, the legal research suggests, one can trace an

evolution of legal perspective and conflicting legal and value orientations in the decisions by the courts. Distinct eras of lawmaking can be identified. Each era of lawmaking seems responsive to different ideological currents and social conflicts, to a different political climate, even when the courts are acting independently and their judgments are beyond serious reproach. The courts interpret and make law differently, depending on the context in which they operate, reflecting but also depending in part on the degree to which they are committed to a substantive consideration of the issues at hand. Current policy debates can also be analyzed historically, the legal research suggests, as these policy debates have evolved and are responsive to changes in the social milieu.

Several legal researchers develop a conceptual model to illustrate both legal pluralism and the social responsiveness of law. Arthurs suggests that the legal perspectives inherent in different kinds of lawmaking can be arranged in a model that reflects, analytically, the degree of commitment in any legal institution to a judicial or an administrative resolution of issues and to state intervention. Macdonald suggests that what now counts as regulation is simply "regulation by regulations," one form of regulatory activity and one form of state intervention. For both Arthurs and Macdonald, a variety of state-economic relationships is possible. Any can be reflected in the design of legal institutions. The choice between either an administrative or a judicial approach, between regulating by regulations or through state-corporate consultation is not a choice between more or less efficient means of accomplishing policy goals primarily. Nor is it random. The choice reflects differing concepts of the appropriate relationships between the state and corporations and thus different value, professional or ideological assumptions. For those who make the decision about whether to use an administrative agency or a judicial process to implement particular policy goals, efficacy or efficiency criteria always seem applicable, and their choice seems unconstrained. Different modes of regulation and different legislation are considered efficient and efficacious, in different eras, however, because assumptions differ about how policy should be made.

A number of the legal research papers provide examples: Bureau et al. trace the evolution of social welfare legislation; Morin, the evolution of labour law; Lajoie et al., the constitutional debate in relation to political currents of thought in Quebec. Emond traces three eras of environmental law, suggesting that one can delineate different orientations in each. He suggests that different policy approaches (use of an agency, reliance on judicial solutions) have seemed appropriate in each period. This evolution has been swift, however, since environmental law reflects quite different preoccupations and a different approach to lawmaking than it did even less than a decade ago. Mossman traces the evolution of family and social welfare legislation, demonstrating how a conflicting orientation in these two integrated areas of law — one area of law

protecting "family" values, another sustaining the values of "individual independence"—has developed historically. She suggests that both court decisions and the design of the courts reflect these different normative preoccupations. She shows how the conflict between value orientations in these two areas of law results today in what must be seen as discriminatory application of law (discriminating against female single parents, for example). All the papers in the first part of the legal research document a similar evolution in the law and root decisions to use different kinds of legal or regulatory instruments in the social context in which the law was developed.

The Relationship between Law and Values

The legal researchers also take issue with the concept of the relationship between law and values inherent in the practitioners' view described here. Again, one can locate a normative and theoretical critique in the legal research, but the primary thrust of their disagreement comes instead from empirical and historical analyses of various areas of the law and of court actions. Recall that the practitioners see law as intrusive, and that they distinguish between law and ethics.

What the practitioners' view neglects, the legal research suggests, is the fact that law, once made, acts as a force in shaping social relations and individual behaviour. Law cannot be viewed only as a collection of rules and remedies, since any body of law also establishes a framework within which assumptions about ethical conduct or judgments are rendered. As law evolves and changes, ethical standards change.

As an example consider how both laws and specific regulations have influenced the public's and hygienist practitioners' view about what is a safe environment for the worker and, therefore in turn, the ethical judgments the conscientious hygienist makes on the job. It is no longer considered acceptable to expose workers to a chemical that may cause harm after some years have elapsed, even if workers are in no immediate danger from that chemical and may not be able to trace directly the cause-and-effect relationship between their exposure and their health. Workers must now be kept informed about dangers or potential harm in the workplace in most jurisdictions.

In both cases, it is often assumed that value judgments preceded the new law and regulations passed to protect workers' health and safety. Most of this law, however, has emerged from the pattern of decision making by the courts that has evolved over time and from incremental regulatory measures adopted by the agencies. Value judgments have been made on a piecemeal basis without prior recognition of their significance. As well, once a body of law exists to determine what is acceptable behaviour, individual judgments about right and wrong are made in relation to them. If the laws have mainly emerged gradually and from many changes, the influence of law on individual ethical judgments

is likely to be unrecognized, however. The ethical judgments — that hygienists make, for example — will seem to be a result only of their personal choices.

Rocher takes the same point further. He suggests that law — and the judicial way of making decisions — is a value in its own right. He cites some examples: people think that "law is fair"; that "individuals have equal rights under the law"; that "law is the same for everyone"; that law embodies wisdom; that law represents the legitimate exercise of authority; that law is or should be efficient; that law acts to keep the peace between otherwise warring individuals; and that law creates rights and obligations. It is easy to demonstrate that these characteristics of law are, as he puts it, "myths" or that they reflect value assumptions about the nature of the legal process.

His point is not, however, simply to show that laws are biased. Law, for Rocher, is a body of rules but also a language, a symbolic system that is, at once, official, directive and universal in orientation and pragmatic and prospective in approach. It is the formalized nature of law, he suggests, that gives law its privileged position in maintaining systems of social control. The values embodied in law are not always consistent, and are seldom made explicit. No law can meet the expections created by all these "myths" equally at all times. An efficient law (one that is responsive to a technical criterion of efficiency) may not be wise, nor may it convey the same sense of authority as a less "efficient" but more comprehensive rule. To some extent, some but not all values within a constellation of myths and values about law are given priority when any piece of legislation is enacted. These meta-judgments about which values law should reflect are seldom (if ever) made explicitly, but act to shape both specific legislation and the ethical decisions that follow from the emergence of any body of law.

As well, Rocher draws attention to the specific values inherent in a judicially oriented legal system. A judicial interpretation of equality in law is not the same as one grounded in a concept of distributive justice, he notes. Equality before the law creates significant inequalities in practice, because the resources that individuals bring to the legal process are different and because legal rights are individual rights, and do not encompass community values easily. Legal rights are generally, though not always, connected to the protection of property; not everyone has property to protect. When Rocher speaks of law as a myth and value, then, he is concerned with the value choice made in deciding (if that is the right term) to use a judicially oriented legal system as a primary organizer of rights and obligations and as the main mechanism for the resolution of disputes in society.

Summary of the First Debate

In sum, most of the conclusions of the legal research can be contrasted with the practitioners' view. The research studies underscore the close

relationship between law and values, and the wide choice about the design of legal institutions available to implement any particular policy. Similarly, the studies show that a distinction between law and individual ethics cannot be supported. Although legislation does reflect choices made by politicians, voters and interest groups, law also creates a framework of expectations and standards that shapes individual value choices. Even the legal process when viewed as an organizer of rights and obligations, and as a means of resolving disputes, reflects a value choice, since it results in demonstrable inequalities in the allocation of resources and "biased" decisions.

The purpose of the legal research was not to explore the philosophical dimensions of the relationship between law and values. To note that individual ethical decisions are made in a framework conditioned by law and regulation is simply to suggest that the social function of law should be taken into account when policies are made; policy makers should be cognizant that they lead as well as follow public choice. It is also to argue that the choices available to those who design the instruments of policy implementation — agencies, courts, tribunals, etc. — reflect the prevailing social climate. What is now reasonably seen as efficient and efficacious law may fail or have failed to serve the public well at some other time.

Public Choice Theory

The legal research conclusions also can be contrasted with public choice theory. Of course, diverse analyses are offered within public choice theory, and some of these are contradictory. For some theorists, the label "public choice theory" serves to identify a disciplinary perspective, that of economics on social issues, one that gives primacy to the interplay of market forces in the analysis. For others, those referred to in the debate being described here, the term "public choice theory" should be both more and less broadly delimited. On one hand, public choice theorists, as that label is used in the debate described here, would increase the scope of economic analysis by viewing "voter" choice as a variant of public choice and the political system as a marketplace of competing values. They would argue that social and political goods are distributed through a political process that is characterized by marketplace relations. On the other hand, the public choice theorists who are seen as engaged in a debate with the conclusions of the legal research would not equate the disciplinary perspective of economics with public choice theory, despite the emphasis of both on market forces. They would draw a line between economic theory in general and public choice theory, as one stream of analysis in economic thought.

The choice of this second version of public choice theory for debate with the legal research is made for two reasons: first, it is important not to set up law and economics as inherently conflicting perspectives, since

they are not, despite the often conflicting views on social relations offered in each discipline. A more finely tuned analysis, one that distinguishes among various market approaches in economics, can avoid the problem. Second, most of the legal research takes issue with something described in the papers as "a public choice approach." Yet, all the legal research is by no means antimarket in approach, and many of its authors are silent on the kinds of questions most economists now raise. What is the subject of discussion in a number of the legal research papers is a particular approach to market analysis, one that infuses both political and legal analysis with disciplinary assumptions taken from economics. It is this approach, called "public choice theory," that is used here to serve as a foil to highlight conclusions from the research.[3]

The first task, however, is to provide a fairly comprehensive view of the relationship between law and values envisioned in public choice theory. Unlike the hygienists, public choice theorists view law and values as inextricably linked. For public choice theorists, law is regarded as the end product of a legislative process reflecting the values of the members of society as consumers of political goods. Of course, one can locate legislative activity in the decisions made by the executive, regulatory agencies or the courts. To public choice theorists, committed to a particular version of democratic theory, this legislative activity occurring outside legislatures represents an aberration, a problem for policy makers. The close connection between law and values is severed when decisions are made that do not reflect consumer choice.

Public choice theorists generally refer to the relationship between law and "values" in four ways.

As "consumer choice" Some theorists speak of a commodity or decision as being valued and thus as constituting a value. Consumer choice represents what is valued by individual members of society. When particular choices are made by a majority of individuals in a society, consumer choice also represents the values of society as a whole. Law and values are linked when consumer choice is enshrined in legislation or in rules developed through a legislative process because only a legislative process institutionalizes consumer choice (voters' choice and interest group negotiation) as the mechanism of policy making.

As involving information and access Some public choice theorists also talk about the need for individuals to have adequate information and an opportunity (and resources) to participate in the marketplace of political and economic goods. Their concern is raised by the demonstrable inequalities that arise from the unfettered operation of marketplace logic in either economic or political life. Obviously, some participants in the marketplace or the political process are advantaged because they have more information, greater sense of access or greater ability to form

interest groups that reflect their views powerfully. Reforms that increase the availability of information and the resources or capacity to participate, then, are seen to improve the democratic quality of market relations and political life. But neither information nor access is necessary in the sense of being a "consumer choice." Voters may not demand or be prepared to see resources allocated to ensuring access and information for all participants in the political process. Interest group negotiation may not result in a choice of more access or information being made. Participation and access to information constitute collective or social values imposed upon a marketplace system to enable it to meet some overriding democratic or redistributive goal or even the goal of maintaining the market system itself.

As a "wild card" Public choice theorists also refer to values as a kind of wild card in the rational calculation of individual interests. They recognize that individual calculations and decisions are not necessarily based in either a rational calculation or self-interest. Indeed, individuals may act against their own self-interest, for religious or philosophical reasons, or because their best friend did so, or on the basis of other kinds of rational calculations than public choice theory discusses. When they do (and when predictions about the outcome of consumer choice oriented policies fail), then reference is made by public choice theory to values. These values constitute a wild card because they are seen to be highly personal, and because they cannot be predicted within the analytical model being used. Some public choice theorists would argue that these value decisions need not be taken into account in the development of public policy.

As public choice theory Finally, public choice theory is itself value-imbued, although the value choices are not necessarily made explicit. The value accorded to the marketplace as an organizer of human affairs and to efficiency as a primary criterion for the evaluation of public policy is often noted. The pareto optimum (or pareto comparable) principle is also value-laden: to achieve pareto optimum one often balances various factors without regard for differences in their quality or the nature of commitment or feeling with respect to them. The net losses and benefits to individuals are aggregated, sometimes without respect to the differences in individuals' situations. The allocation of costs and benefits within the market system is seen to be of little interest. Rather, individuals, and their needs and desires, are treated as functionally equivalent. Social values are seen as legitimate only to the extent that they are derived only from what individuals are thought to want. To treat values from the perspective of public choice behaviour is to assume that all political and social behaviour conforms, in some respect, to marketplace behaviour; that all calculations are at once individual and self-

interested and that, in theory at least, all individuals are capable players in the negotiation of their own interests.

Public choice analysts face two serious challenges to their theoretical framework. One is about the nature of law. Law may be reflective of a negotiation of interests. It is also a crystallization of collective and social values, as separate from the interests of individuals in the social unit. Legal institutions, and courts in particular, are specifically and historically insulated from the pressures and constraints of the legislative or executive process so that legal decisions can be made without reference to a negotiation of interests so much as by reference to precedent and judgment. Law is grounded in a different kind of rationality than the one proposed as a basis for public policy by public choice theorists. Legal decisions are seen to involve, at best, a synthesis of technical rationality, expertise, precedent and convention. Political pressures are held at bay, again at best, through the appointment of an independent judiciary and the procedures of the legal process. Accountability is achieved through the judicial process rather than as a result of voter representation. These characteristics of law present a challenge to the basic tenets and values of a public choice approach.

Public choice theorists also recognize a similar challenge in dealing with regulation. Some aspects of regulatory activity do not conform to the public choice model. For example, one important historical justification for the use of regulatory agencies is that agencies can make technically complex decisions. Regulators are expected to bring expertise and experience to their evaluation of issues. No one has suggested that regulation is immune to interest group negotiation and pressures, but these pressures (made public through the hearing process) are supposed to be balanced against other kinds of assessment in a properly functioning regulatory process. In such a process, the discretion that regulators exercise stems, in part, from their capacity to evaluate issues and to make informed judgments on the basis of evidence, not just opinion. Again, public choice theory cannot easily take regulatory expertise and "informed judgment" into account in dealing with regulation as a form of lawmaking.

Public choice theorists respond to these two challenges not by a reformulation of theory but instead by a series of radical proposals for reform of the legal and political system. They suggest three alternatives: (a) removal of the legislative function from regulatory and executive officials and from the courts when possible; (b) the increased use of contracts between private parties and of criminal law sanctions to aid in the implementation and enforcement of guidelines and standards, in this case mainly to avoid the formal legislative or regulatory process altogether; and (c) the formalization and specification of legal rules, particularly when law reflects social or collective values, so that the courts will act mainly with a narrow conception of their mandate.

The first two proposals (and aspects of the third) are familiar to anyone

in the regulatory debate. They are designed to create a political system in which both court action and agencies fall either under the supervision of legislators or outside the purview of government. Discretionary authority and policy-making functions of the courts themselves are to be limited; disputes are to be resolved by private parties when possible. Legal remedies, implemented through a formalistic court rather than through administrative process, are to replace the more informal (and often negotiated) sanctions of regulation. Interest group negotiation, as a key component of any legislative activity or outside the legislative process, is to be used exclusively and openly, when possible, to formulate public policies that will reflect consumer (voter) choice. The goal is often called "efficiency"; the purpose of reforms is to ensure the system functions as public choice theorists believe it should.

A number of the policy options currently being discussed are tied into this program for reform. Reform of the courts, a role for the provinces in appointing the judiciary, judicial review of agency decisions, dismantling some regulatory functions, using criminal rather than regulatory sanctions in environmental law, experiments in contract law designed to deal with environmental issues, increased consultation and notice, all fall easily within the scope of what is envisioned. These measures all can act to reduce the discretionary power of non-legislative instruments of rule making, or reduce the role of government and narrow the activities of the courts. They all seek to ensure that law is linked mainly only with the values that consumers and voters choose.

Some areas of law are not so easily reformed by advocates of public choice theory. These areas of law demand a far-reaching attitude — a long-term perspective — on the part of the courts and maximum possible discretion in the application of rules. More important, they demand a kind of assessment that only sometimes renders judgment in accord with prevailing public opinion. These kinds of law can be called quality of life law. A common assumption is that quality of life law embodies values other than those that individuals prefer when considering only their own personal interests. These laws reflect collective values of society. The cost-effectiveness of quality of life laws cannot really be calculated because, in some senses, quality of life laws act as a conscience of society, and shape, rather than mirror, public pressure.

Proposals made by public choice theorists for the narrowing of the scope of law and government involvement may bring even quality of life laws into the sphere of immediate influence of legislators. To the degree that the discretion of the courts is limited by provisions in the legislation or by rules vetted through or approved by legislators, consumer choice, interest group negotiation and political pressure all legitimately can shape even quality of life laws. It may be that the more specific any quality of life law can be made, the less likely that quality of life laws will reflect any overriding definition of the common good. If the discretion of the courts and agencies is limited by legislative supervision the resultant

quality of life laws are less likely to reflect the courts' or administrators' expertise. In legislatively specific quality of life laws, those envisioned in public choice theory, political influence may also legitimately be brought directly to bear not only on the general direction of policy but also in its application of law to specific cases. Cabinet can intervene directly in the specific decisions that agencies make. In these circumstances, even quality of life laws will reflect the often changing will of legislators rather than any historically conditioned concept of a social good.

An example illustrates the changes in quality of life laws envisaged in some public choice proposals for law and regulatory reform. The *Broadcasting Act* is a statute that entrenches a quality of life value. It speaks of "strengthening the social, cultural and economic fabric of Canada" as the legitimate goal of policy and its application. Currently, broadcasting law is not legislatively specific. How the social fabric is to be strengthened is left to the discretion of an agency that has, in theory, an arm's-length relationship to the political process, and is supposed to exercise expertise in reaching its decisions. Political influence is not supposed to have any effect on either the rule-making or licensing functions of the agency. Proposals for reform would bring broadcasting policy under the auspices of a legislative process. They are: cabinet should issue policy directives; a parliamentary committee should debate regulations; provincial governments should participate in appointments to the regulatory agency; agency decisions should be reviewable both by the courts and by cabinet; legislative criteria for licensing decisions (including regional representativeness) should be specified in a rewrite of the act; the public hearings should be determinant in decision making, and rules should establish parties with standing in a more judicially oriented hearing procedure; an Administrative Procedures Act should govern how agencies conduct their business, as legislation does in the United States; the industry should be deregulated at least with respect to social and cultural regulation.

Any or all of these proposals could change — albeit differently — the nature of broadcast regulation by substituting different values for those now embodied in the *Broadcasting Act*. If these proposals are adopted, instead of the quality of life values now embodied in the act, its emphasis would be on representativeness, accountability, information and access, competition and free markets, and, finally, on consumer choice. And to the degree that consumer choice reflects interest group negotiations, the values that would be reflected in a reformed *Broadcasting Act* would be less socially (culturally) oriented and more reflective of those interest group negotiations as well. If the proposals were accepted, instead of making decisions on the basis of an expert assessment, the agency would be expected to respond explicitly and primarily to the claims of interest groups and voters represented in a political process. The proposals for reform of the *Broadcasting Act* are typical of those being advocated in other areas of policy.

For the purists among the public choice theorists, the question is not whether to expand the number of values that law will reflect to include greater representativeness. Laws and legal institutions are not simply to be made more responsive to public choice. Nor is the goal simply to make existing regulatory authorities more publicly accountable. The purist public choice theorists emphasize the difficulty of determining what are appropriate quality of life values. They suggest that social and cultural goals cannot be efficiently realized through legal and regulatory instruments or, indeed, through any form of government intervention in economic life. These public choice theorists argue that if people value social, cultural and community goods, their choice will be reflected in "aggregate interests," in the voters' and consumers' choice in a market of economic trade-offs and political goods. They dispute the capacity of executive and regulatory authorities to respond to anything more than interest group pressures despite legal mandates that often include quality of life. They argue that interest group preferences and pressures are most fairly dealt with only in an explicitly legislative process or outside the framework of government. For these public choice theorists, consumer choice, and only consumer choice, should be sovereign — even if it results in laws that reflect only interest group negotiations or if the result is no quality of life law at all.

Thus, the same proposals for regulatory reform (or for making laws more specific), however reasonable and limited they appear, can be radical when advocated in the context of some public choice assumptions and much less so when proposed by others. What is envisioned, in at least some public choice theory, is a change in the conventional relationships between the many levels and branches of government. Only one type of law — that responding to consumer choice — is to be paramount, and only one form of legislative activity — that occurring in the legislatures proper — is to be considered as legitimate. All other legal institutions or instruments of government action are to be brought under the supervision of legislators or dismantled in favour of private resolution of conflicts backed by a formalistic court. Law and policy are to be reoriented from established quality of life values to other values that are viewed as more legitimate because they are derived from marketplace choices. Expertise in decision making by the courts or by agencies is to be of less value; accountability and representativeness become the only criteria in the evaluation of any policy or decision. At least some public choice theorists demand, as is evident from the deregulation debate, a systematic overhaul of all legislation and of the design of all legal institutions.

The Response of the Legal Research

Before the legal research studies can be discussed in relation to public choice theory, a number of points should be made. First, some of the authors in the legal research papers intend a challenge to public choice

theory. For them, public choice analysis is a theoretical construct, not a practical guide to politics. It is seen as a single-answer approach to complex problems, as Belobaba notes, a reductionist calculus of the intricacies of human values and political choice. Other authors in the study find some of the tenets and analysis of public choice theory attractive. For them, what is bothersome is only the contention that the analysis is systemic and comprehensive. What they reject is the radical program for change implied in public choice theory and its application in policy. Their comments appear to be a challenge to public choice theory mainly because the assumptions of public choice theory are currently accepted by some policy makers, and are leading to some sweeping changes in Canadian legal institutions in the guise of incremental reforms.

Second, public choice theory is associated with the right of the political spectrum and with proposals for significant deregulation. A challenge to public choice theory can come from the right or the left, or from those who simply question the empirical data upon which the analysis is based. Some authors may dislike public choice's all-embracing character, its putative precision and claim to being scientific, or its highly prescriptive — some would say ideological — character. Yet they may also accept elements of the public choice analysis: for example, its emphasis on the role that market forces and interests play in the formation of policy. A stronger competition policy might be a plank in the platform of public choice theory or in that of its critics.

The first debate, between the "practitioners" and the legal researchers, was presented above partly as an antidote to any bipolar description of the current policy debate in Canada. The conclusions from the legal studies also call into question some of the empirical data and founding assumptions of public choice theory. Although the discussion here has been cast as two debates, it would be an error to view one of these debates simply as between public choice theorists and the legal research of the Commission, or as a debate between socially conscious legal researchers and technically competent economists. In fact, the legal research indicates that many different policy approaches than those offered in the public choice theory described here may be necessary to take account of all the empirical data about law and values. The authors of the individual research papers did not reach consensus on a single set of policy proposals, however, and the synthesis they present is not an agreement among them about the value of markets or their efficient operation or even about the value of government regulation.

Finally, a public choice approach is said to reflect prevailing public opinion and to some extent it does. But it also does not. Two points should be noted. First, the desire for less "government intervention" is usually coupled with demands for more government participation in shaping a healthy economy, in promoting social or cultural values or in

protecting the environment and human health and safety; surveys in both Canada and the United States confirm that the public holds both conflicting views. Second, public opinion is actively shaped by those who can articulate their views in a public arena and by the media. Resources, access and the availability of information, at the very least, influence what will be presented as analysis and options to the public and what will be covered in the media. These resources are, of course, unevenly distributed. Any choice made by the members of the public reflects the distribution of resources for access to the media as well as the choices made by the public as individuals.

The Relationship between Law and Values

The legal research studies also call into question some public choice assumptions about the relationship between law and values. Here it is necessary to go back to a description of public choice theory for a minute. Recall that in public choice theory an almost linear relationship exists between individual value choices and legislative action. But public choice theorists recognize that individual values do not influence legislation directly very often. Rather, in public choice theory two intervening variables account for the political nature of legislative decision making: (1) the choices that politicans as interest-maximizing individuals make in deciding which policies to pursue, and (2) the relative power of various interest group pressures.

The public choice theorists described here suggest that the first of these intervening variables — choices made by politicians — would bias policy decisions by making legislative decisions reflective only of the very short-run consequences of politicians' interests, were it not that politicians must pay heed to voter choice to maximize their chances of being elected and of maintaining power. Sometimes voters seek long-run or socially oriented policies. Politicians must act upon these public choices as well as their own short-run interests. Public choice theorists argue, then, that politicians' own rational calculations mediate the relationship between consumer (voter) choice and legislative action. The politicians' calculations do not bias the final result against consumer sovereignty because, public choice theorists argue, the goal of maintaining political power requires politicians to respond to any and all kinds of public pressures, and in some respects, these pressures also represent consumer choice.

Similarly, public choice theorists suggest that interest groups are formed simply to reflect the choices that individuals make, and that these powerful interest groups only lend a collective voice and power to the expression of individuals' will. Thus, in theory, interest group negotiation is entirely compatible with a view of the relationship between law and values that connects individual choice with legislative decision making quite directly. Of course, some of the public's interests are more

conducive to effective representation and some individuals have an easier time gathering the resources necessary for effective participation. In public choice theory the easily demonstrated inequalities of interest group influence are to be redressed by finding ways to even the balance. More information, easier routes of access for ordinary citizens and funding for public and consumer interest representation are all proposals made in an attempt by public choice theorists to resolve the inequalities of an interest group oriented political process without altering the conceptual model of the relationship between law and values.

For most of the legal researchers, even this more sophisticated picture of the relationship between law and values is too simple. The legal research studies take issue with any model that poses the existence of a linear relationship between individual values and legislation. The legal research suggests that, in fact, there exists a complex of social, political and economic institutions mediating the relations between individuals and the state. These complex institutions, in fact, determine the nature of the relationship between law and values. Think of the effect of the family, of the social welfare system, of a multiplicity of voluntary organizations (religious, political, economic, and social), of jurisdictional arrangements, of professional values and actions, or even of the business community taken as a whole. These institutional realities demonstrably shape how law and values are fashioned, how law influences values and vice versa.

The argument is made in the legal research, then, that a conceptual model (like the model offered in public choice theory) that underplays the significance of these intermediate institutions in mediating the relationship between law and individual values is empirically deficient. This is true particularly if the social dimensions and impact of the institutional life are neglected because the family, the welfare system, the professional society and the business lobby group are considered only as minimarketplaces of human and political goods. As Belobaba notes, an interdisciplinary approach that includes only the insights of economists and lawyers, but not those of social scientists or psychologists, is limited indeed.

In addition, the linear relationship between law and values described in public choice theory gives credence to individual values only. In his legal research, Emond argues that such an approach, while explaining much, fails to take account of some relevant problems in environmental law. Some interests, he suggests, cannot be viewed as individual, cannot be addressed by policies based on a pareto optimum principle. To deal with environmental degradation, water rights, the scenic value of a landscape, the disposition of chemical wastes, and the protection of any future value in the environment requires a concept of common and collective interests. Making the conceptual model more sophisticated, as is done by some public choice theorists to take account of the in-

equalities introduced by interest group pressures, will not suffice to protect an environmental resource for the future because no calculation of interests in the public choice model can encompass a situation in which those who pay the costs will not necessarily receive any of the benefits, even indirectly.

A similar problem is noted by Makuch, in his research on municipal law. Makuch finds that zoning authorities often lack a capacity to shape the cityscape or enrich the social or cultural life of its citizens, that zoning decisions are made reactively, that zoning decisions are sometimes made only in response to applications for development. Yet, according to Makuch, the alternative of creating a comprehensive plan for city development is not a solution, even if community or collective values can be embodied in such a plan. Such plans are often too inflexible and the way they are implemented defeats the very goals these zoning plans are designed to further. Four factors — public investment decisions, spot zoning, the heavy hand of federal or provincial authorities, and the lack of resources available at the municipal level to pay for social amenities — affect any broad concept of a public interest in zoning.

Without different jurisdictional and legal arrangements, comprehensive city planning will fail, Makuch argues, even if no one likes the result of unplanned city growth. The role of municipal authorities, as legislative bodies in their own right, as investors in municipal development and as appropriate actors in the planning effort, is undermined, in part by the market (land sales and development), but equally, he suggests, by decisions taken by other bodies with no direct interest in developing any particular vision of city life.

A conceptual model linking legislation and values in a linear or causal relationship is deficient on three grounds. It does not encompass the complexity of the institutional (and jurisdictional) reality in which planning decisions are made; it cannot easily result in policies that reflect a community interest or benefit individuals only very indirectly (the improvement of one neighbourhood affects those in adjacent areas, for example); and it does not take into account the fact that planning conventionally is based in a different kind of rational calculation than that of interest maximization.

The Relationship between the State and Law

As described above, public choice theorists envision a relatively simple relationship between the state (government and all its institutions and branches) and law. For them, law is an instrument of state policy. The legal research studies indicate that the picture is much more complex. In particular, the legal research suggests that the state fulfills a multiplicity of roles and expectations, each placing conflicting demands on the law.[4] Four sets of conflicting expectations of law and the state are identified

through the legal research. They are listed below to show what the legal researchers identify as the range of legitimate pressures on the development of policy.

Public versus private goals for policy In the legal research, Beck argues that no state in a private or mixed economy can act to disrupt its own harmonious relations with the business community for any length of time. Nor can any government that fails to support a healthy climate for investors be said to represent the public's interest. Yet the interests of the business community (as a whole and in terms of individual firms in the market) are determined, at least legally, in terms of their duty to their shareholders. This duty may well conflict with decisions to protect the public interest, with the duty to protect workers' health and safety or the environment for example. The state, Beck argues, is caught in a conflict between two kinds of public interest, each legitimate in its own right. Any simple resolution of the conflict between these two public interests will fail; state policies inevitably reflect these two conflicting goals.

The goals of a central government The legal research suggests that a second conflict exists between two legitimate public views of what a central state should be. One view of the state argues a need for a strong core of shared national institutions to promote equality and social or economic development throughout Canada. The other stresses regional needs, the provincial claim to reflect local conditions and aspirations. A resolution between the views of the Canadian state as a unifying force and as a compromise of regional interests is unlikely. Law, policy and proposals for reform reflect the swing of the pendulum between different conceptions of the national/provincial relationship and between the values inherent in these different concepts.

The many goals of any state in any economy The legal research suggests that, in more specific and pragmatic terms, the state is caught in a multiplicity of roles that necessarily involve contradictory actions and obligations. In his work on labour law, Morin draws attention to these many roles of the state and to the potential conflicts between them. He notes that the state is an arbitrator of conflicts, in part through the law, but equally through policies that promote conflict resolution. The state also functions as a keeper of the peace, by maintaining the conditions for orderly economic development and/or market relations and by policing a system of collective bargaining. Of course, the state is also a funder of economic development, through contracting and grants or economic development projects and a necessary partner in efforts to regenerate the economy. As well, through Crown corporations, the state is owner and manager of some resources and, at once, employer, producer and user of those resources. Finally, the state has different interests from

those of its workers or even those of its public as consumers, but is the legitimate representative of those interests in many areas of policy.

Although dismantling the multiple roles of the state of both workers and consumers — and confining state activity to a few, seemingly non-conflicting tasks — seems attractive at first glance, the legal research suggests that proposals to this effect are empirically naïve. In practice, the legal research demonstrates that the choice is not which role of the state is legitimate but which legitimate role should predominate. The question is how to balance the conflicting roles in the design of legal institutions.

National, economic and consumer-interest goals Finally, the legal research suggests that a conflict arises from the values that the state — any state — must embody in economic policy. Obviously, the state must respond to values reflecting the consumer interest. This demands policies that result in an efficient delivery of services and goods to consumers at the lowest possible cost. The state's interest in economic development has also been noted. It is sometimes necessary to sacrifice consumer interests (narrowly conceived) and short-term efficiencies to achieve the promotion of long-term benefits in developing high-risk technologies or frontier areas or in addressing regional imbalances.

A "national interest" — Canada as a sovereign state — is different from the previous two. That is, policies are needed that serve to establish independence of action and freedom of choice for both national and provincial governments. These policies are sometimes developed only at the cost of ensuring the best possible price to consumers or even of economic development.

Marketing boards are good examples of the attempt to compromise conflicting policy goals. Any change or "reform" of marketing boards would have to take account of three different interests — a national, an economic and a consumer interest.

The legal research suggests that any proposal would involve a trade-off of value choices. The choice of legal or regulatory instrument to achieve a policy/goal is sometimes irrelevant, the legal research seems to suggest, since conflicts in values that the state must sustain will remain, regardless of how policies are developed and implemented.

Summary of the Second Debate

In sum, the pluralist view of the relationship between law and the state reflected in the legal research cannot produce a comprehensive program for reform or a neatly articulated proposal for action. The legal research cannot say which is better, a judicial or an administrative approach. It cannot say that, in most cases, contracts should replace regulation, or that any one new program of reforms will work better than the current system of agencies, tribunals and courts. The legal research papers are

notable for their absence of radical or far-reaching solutions. Instead, the legal research demonstrates the need for incremental action and a pragmatic approach to law, legal reform and policy making. It suggests that any "new approach" would simply be the result of the pendulum swinging, a temporary endorsement of some priorities over others. The legal researchers predict that the pendulum will swing back. The proposals contained in the legal research papers for reform are grounded in a balanced assessment of what the legal research concludes is possible in law. This pragmatic view is not a philosophical commitment. It is based on the historical and specific studies of different areas of law in Canada.

The public choice alternative that was described here is attractive precisely because it does offer "a clean sweep," a radically different approach to law and policy. The implicit demand of the public choice theorists is that some value choices be permanently settled so that consistency can be achieved in institutional design and in the application of law. The challenge to the public choice theorists offered through the legal research is not necessarily or only a challenge to the value analysis in public choice theory. It is not necessarily a challenge to either a market or deregulatory approach. The legal research only questions whether law and policy could ever be made on the basis of a single, unchanging hierarchy of principles in a democracy. The legal research casts doubt on whether any one set of principles can ever achieve either public support or effective implementation, given the inherently complex environment and conflicting roles of the state. The legal research suggests otherwise, regardless even of the value, theoretical or policy preferences of the individual legal researchers.

Canadians today are engaged in a new and critical debate about the shape of public policy. This debate is really not about deregulation, although it is often described that way. Rather, it is a debate about how to view the relationship between law and values. This current policy debate in Canada has been represented in the first section of this paper by the discussion of three views of the relationship between law and values. The views of the practitioners of standard-setting have been contrasted with the conclusions of the legal research. The approach taken in one variant of public choice theory was contrasted with other conclusions from the legal research. What can be concluded from these three views presented here?

Would a more judicialized process of dispute resolution be more responsive to public needs? Not likely, suggests the legal research, since, in practice, law shades into regulation and vice versa. Should laws be more specific and the discretion of the courts and agencies limited? Only at the price of making laws less responsive to a technologically complex society or a range of social problems. Is there one approach to administrative law reform that would ensure agencies were more accountable? No, each approach to reform accomplishes some goals, but if pursued single-mindedly will undermine the values it seeks to

support. Should consumer choice be paramount in the development of public policy? Sometimes and with respect to some kinds of law. But the public expectations of law and regulation are many and varied and no one approach, whether it is market-oriented or not, will meet all these expectations and satisfy the full range of public demand. There are, the legal researchers argue, some social and public interest goals that cannot be met within the framework of a market system and that will be lost if a market-oriented analysis (like public choice theory) is used exclusively as an instrument of public policy analysis and reform.

To be more specific: should the Supreme Court be reformed to be more responsive or representative? There is no evidence that the Court has been biased toward representing only federal interests, and indeed the Court's priorities and orientation have changed in response to changes in the social milieu. A more technically competent and administratively oriented body might be necessary, however, to deal with the kinds of jurisdictional and economic issues, riddled with political value choices, now being brought before the Court.

What of regulation: to what extent should it be reformed or replaced by other approaches? The legal research finds that more has been accomplished by regulation than is generally understood, and that other approaches also have important regulatory implications. As well, any new approach to accomplishing public interest goals will require effective implementation and enforcement just as regulation does. Nonetheless, a number of researchers discuss possible alternatives to regulation and find some worthy of experimentation. They conclude, however, that the complexity of legal institutions, with their mix of judicial and administrative approaches and their generally wide scope of discretionary powers, is a product of a highly complex society and its problems. The legal research cautions against any simple-answer approach to policy making.

Some questions remain. In fact, governments pursue, as they must, a variety of approaches to policy designed to meet the various expectations of law of their many publics. Some approaches are better suited to solving certain problems than others: different approaches reflect different value choices. The task of the second major section of this paper is to explore the relationship between specific approaches to policy, the values each embodies and the conditions under which any approach is appropriate. The policy debate described in the first section is no longer the focus of attention; rather, the emphasis is on how to design a public policy that is tailored to a number of quite different public needs.

A Working Concept of Values and Policy Options

In the first section of this paper, it was argued that legal pluralism was an appropriate governmental response to the public expectations of law and regulation. In general terms, the choices available to any government

among various approaches to policy are well known. What is less easily appreciated are the value implications of the various choices and, as well, the conditions under which each policy choice is appropriate.

The second section of this paper is designed to make the value implications of different policy choices apparent. To begin, a distinction is drawn among three approaches to law and regulation: viewing law and regulation as a safety net; seeking to achieve quality of life goals through law; and viewing law and regulation as primarily instruments of redistributive policy. Once the values inherent in each of these approaches are described, it is easier to determine when each approach is appropriate and the conditions for its success. I argue, in fact, that these conditions for success can be spelled out in list form and provide examples of each condition in operation.

A further distinction among different approaches to law and regulation is necessary. Especially in conjunction with redistributive policies, a variety of instruments of government policy might be chosen. One can, for example, accomplish the same legal or regulatory goals through government regulation or through a program of subsidies. Each option rests upon a different value choice, however. Distinguishing among the options for regulatory action in terms of the symbolic messages and values each conveys allows policy makers to make informed choices about when to substitute one approach for another, as, for example, in choosing when to replace governmental regulation by subsidies.

A final point should be noted in introducing this section. The distinction between various approaches to law and regulation — between law as a "safety net," or as affecting the "quality of life" or as effecting "redistribution" — seems somewhat artificial at first glance. All laws create "safety nets," have some influence on the "quality of life," and have redistributive aspects. Viewing each of these aspects of law as characteristics of different approaches to law and regulation is more than a heuristic device, however. A law whose primary orientation is to create a safety net will be different from one oriented primarily to achieving quality of life values or from another designed to redistribute resources. Focussing on the different approaches to lawmaking allows us to lay bare the value implications and policy options that follow from emphasizing one aspect of any law over another.

The Safety Net Approach

The first approach to law and regulation to be discussed here is best characterized by referring to law and regulation as a "safety net." The term "safety net" has several different meanings, however. For example, the industrial hygienists quoted above considered that legal remedies might protect their professional integrity, that law was a safety net of last resort. A more commonly held perspective is that any governmental

action can be viewed as a safety net inasmuch as it protects individuals from abuse in the marketplace, in their social or family relations or even from government itself. From this commonly held perspective, the crucial issue to be determined in the policy debate is how wide the margin of safety in any safety net should be. Many people argue, for example, that governments should provide the maximum possible protection, the widest possible safety net for all their citizens at all times. They tend to think that all regulatory authorities should function as they do in airline safety, where no margin of error resulting in human injury or loss of life is considered acceptable, regardless of the cost of ensuring safety for all.

A third perspective on the safety net function of law and regulation comes from the front lines of the regulatory debate and from the academic literature.[5] Proponents of this third view stress the potentially coercive nature of law and regulations, and argue that both social and market relations are best left unconstrained by governmental intervention. Since the efficient operation of the market produces its own problems, and since individual social relations go seriously astray, the purpose of a regulatory safety net is to ensure not only that the market works as it should, but also that governments and economic forces have a human face.

This third safety net function of law and regulation is discussed in the technical literature with reference to terms like "risk," "compensation" and "mitigation." Risk is a measure of possible harm; compensation and mitigation are measures taken to alleviate or minimize risk. The function of the regulatory process, from this third perspective of law as a safety net, is to estimate the degree of risk and to determine appropriate compensation or mitigation measures to deal with that risk. When possible, government involvement is kept to a minimum. In each risk assessment, consideration is given to the seriousness of the risk being considered, but the seriousness of any risk is determined in a comparison with other risks and with reference to the costs and benefits of various proposals of alleviating that risk. Thus, with a safety net approach, it is possible to conceive of policies and regulatory approaches that might result in human loss or suffering, if the cost of preventing that suffering was relatively high and the number of individuals affected was relatively small.

Some Value Considerations

The safety net approach is familiar to anyone active in the regulatory debate, so its value assumptions are easily overlooked. They should be stated here.

First, in any risk-oriented or safety net approach, government regulation or the creation of a safety net is contingent upon a comparative evaluation of the harm to be caused and the costs of public response. In

safety net regulation, governments cease to act in a primarily preventive mode, but weigh each potential government intervention against others that also impose costs on the public or industry. The kind of studies done to support safety net regulation evaluate a variety of factors supporting or constraining government action. Questions of the seriousness of the harm, the willingness of the public to bear it, the degree to which the harm is assumed voluntarily, the costs to industry of further action and the relative benefits from one action as opposed to another are answered before a decision is taken to create or strengthen a safety net.

Second, in a safety net approach, economic values take precedence over social ones. The emphasis in a risk assessment is on costs and benefits. The discussion about the social goods that might result from government intervention is subsumed under a broader discussion about how to maintain jobs or a productive economy. Even in a discussion of health and safety regulations, the costs of accidents or illness are considered. Questions are raised about the effect of health and safety regulation on the efficiency of markets.

Third, in a safety net approach, interest group negotiations are considered appropriate as the primary means of determining when and to what extent a safety net is necessary. Even in the scientific assessments that often accompany a "risk assessment," a balancing of interests is done and various interest groups may participate to negotiate a standard to be applied to achieve what they agree on as an appropriate level of safety.

Finally, while in theory any risk might be approached from a safety net perspective, only some are. For example, one might use the safety net approach to deal with chaotic conditions in markets or with abuses of monopoly power in specific markets. In practice, it is in areas traditionally considered as social regulation that the risk approach has taken hold.[6] Environmental problems and health and safety issues are now largely considered from a safety net perspective but other issues equally amenable to a safety net approach are not.

Conditions for Success

A number of conditions can be identified for a successful use of a safety net approach to law and regulation. They are:

Ethically acceptable risk The safety net approach only works when ethically acceptable risks are being considered. Because the safety net approach involves a comparison of risks, it is not useful when the risks are unacceptable regardless of the cost of alleviating them. For example, in Bhopal, where many lives were lost because of a chemical leak from a plant, a risk approach would be considered ethically unacceptable in retrospect, although it was and still is used as a basis for regulatory policy and as a guide to corporate decisions.

Effective means of implementation and enforcement Because a safety net approach involves an interest group negotiation, it is amenable to some form of self-regulation. Unless the mechanisms exist to enforce self-regulatory measures, self-regulation becomes a form of no regulation. For example, a company might receive a permit to construct a pipeline as a result of a risk assessment and, in doing so, promise to implement wildlife enhancement programs to offset the environmental damage likely to be done. Unless some way exists to enforce the establishment of these programs, and monitor them, the company may do nothing. But compliance with the permit cannot easily be enforced after the fact, after the pipeline is built and the damage is done.

Identification of all affected interest groups This is necessary because the safety net approach involves an interest group negotiation. The evaluation of risk and of costs and benefits is dependent on full participation of all who are affected by any decision. A safety net approach often will require funding of some interest group to ensure their participation. For example, poor people, native groups, local communities, and smaller special interest groups are unlikely to participate in a risk assessment unless their participation is sponsored. Unless they do, however, neither the risks nor the benefits of any proposed project can be estimated.

A fair process of negotiation and an arbitration approach when disputes arise Often this means the creation of an administrative body or agency to oversee the negotiations among interested parties, to ensure that the relative power of any group does not bias the process unfairly and to settle disputes. For example, labour relations, which involve interest group negotiations, seem to require extensive governmental administrative support. Similarly, economic decisions involving environmental consequences are made under the auspices of a government inquiry, even when the government is a relatively unimportant participant in the final decision. Government participation is seen as necessary to ensure the fairness of the negotiation process.

A common orientation to resource management The safety net approach is used when what is to be decided is the best use of a common resource. In this situation, interested parties are viewed as all having a stake in the proper management of a resource and thus as having some incentive to bargain with others. There are situations in which a common orientation to resource management is inappropriate. This is so, for example, when the risks fall unevenly on culturally distinct and socially disadvantaged groups, or the interested groups involved in bargaining do not all share the same incentive to bargain in good faith. Not all groups have the same things in common to protect in addition to their differing

interests. For example, a common resource *is* the environment; thus all participants in an environmental assessment can be seen to have a stake in its protection. A common resource management approach is useful in this case, because decisions must be taken about how resource management is best achieved from the perspective of all interested parties.

On the other hand, the cultural identity of native people and their sovereignty over their land (as part of that identity) are not common resources. Interest group negotiation within the context of a safety net approach produces a compromise in interests. Nonetheless, a resource management orientation is inappropriate. Some of the parties with an interest in resource management have no common stake in any final decision that protects the cultural survival of native people.

Compatibility between the public interest and private goals In a safety net approach, it is assumed that interested parties will negotiate an arrangement for management of a resource that is also in the public's general interest. When the common or collective interest cannot be properly represented in an interest group negotiation or when public and private interest goals are incompatible, then a safety net approach is unlikely to serve the public interest very well. For example, an interest group negotiation over a proposed site for nuclear waste disposal is unlikely to produce a satisfactory result because the interest to be protected is communal, collective and future-oriented, while the parties to the negotiation all have personal and immediate interests.

Applications and Problems of the Safety Net Approach

Weiler argues that the collective bargaining process is a good example of effective safety net law and regulation. Whatever their differences, labour, government and management do share the common goal in this society of preventing unnecessary work stoppages and encouraging a stable and productive work force. The resource to be managed, in this case, is labour itself. The interested parties can be and are represented through the bargaining process. The fairness of the negotiations is guaranteed through labour legislation and through the labour boards in each jurisdiction that conduct regulatory assessments when necessary. Implementation and enforcement of decisions made through the bargaining process are ensured, again through labour relations law and the operations of the boards.

The new environmental assessment processes, put into place federally and in most provinces in the last decade, are also examples of a relatively successful use of a safety net approach. The orientation of the environmental assessment process is to the management of a common resource, the environment. Government, industry and members of the public are assumed to share a common stake in the proper management and development of the environment. Thus, they have similar incentives

to bargain on the same issues. While some of these groups have considerably less power than others in the environmental assessment process, procedures adopted by environmental assessment panels — like funding of intervenors — usually ensure that the risks, costs and benefits can be identified adequately. It is worth noting, however, that the environmental assessment process grinds to a halt when public consensus is lacking about the ethical acceptability of the risks involved in any proposed project.

As noted above, a safety net approach often, though not necessarily, involves some form of self-regulation. Thus, a safety net approach can include reliance on the parties to reach an agreement. The process of interest group negotiation, accompanying a risk assessment in a safety net approach, facilitiates this bargaining process among the interested parties. As in labour negotiations, the bargaining may result in contracts or agreements that do not involve government regulation in the first instance. Government intervention, in that case, is limited to dealing with conflicts between parties, a breakdown of negotiations and supervision of enforcement of contracts when necessary.

There are some cases in which this self-regulatory approach does not work well. First, as Morin suggests, the process of labour negotiation has been invested with a public interest that transcends the interests of the parties. What began as a private bargaining process, he argues, now involves necessarily greater governmental participation, to the point where now, in some situations, the government may intervene to cause parties to negotiate or to fashion an agreement between them. Under these conditions, characterizing collective bargaining as self-regulation, rather than as government regulation, describes only some aspects of the process. A safety net approach would not result in decisions that protected the public's more general interests, even though labour-management relations would normally be conducted through a bargaining process.

Second, the argument for using a safety net approach is currently being extended to cover both occupational health and safety regulation and environmental protection. Again, in these areas of law, a safety net approach is likely to cause problems. The argument for using a safety net approach is usually couched mainly in negative terms. It is said, for example, that government regulation is too costly, and that government regulations are often not enforceable or enforced, given the resources available to the regulators. As well, the assessment process leading to the development of regulations is criticized as being insensitive to the needs of various interest groups and unresponsive to new scientific information.

Suggestions have been made that a safety net approach, perhaps combined with something akin to a collective bargaining process involving the interested parties, would address these current problems with

government regulation. According to advocates of a safety net bargaining approach, it would solve these problems by:

- integrating scientific and interest group negotiations into a single process;
- using a methodology ("risk assessment") that could be defended as scientific;
- leaving parties with interests to negotiate a compromise of their interests without government involvement (or with government as simply one interested party);
- using contracts as the means of coming to an agreement; and
- relying on the courts to ensure enforcement of contract provisions.[7]

In evaluating the merit of proposals to link safety net regulation and bargaining in a single process, certain features of health and safety and environmental issues should be taken into account. Several factors combine to cast doubt on the efficiency of a safety net bargaining approach to these issues.

It is important, for example, to note that any contracts negotiated through a bargaining process and involving workers' health and safety would have to be based on health and safety standards that were known and considered applicable at the time of the contract, and were agreed upon by the parties to that contract. When health and safety standards change over time in response to new scientific information, contracts cannot easily accommodate those changes. New information cannot be included in a previously negotiated contract, nor can any contract take account of gradually increasing knowledge about problems in the workplace. Thus, new information would not result in increased protection to the worker, unless, of course, contracts were renegotiated. When a contract fails to accommodate the changing standards, workers' health suffers. Under these conditions, a safety net approach involving contracts undermines the rights that workers now have to a safe environment. Moreover, workers would have difficulty forcing a renegotiation of a contract whenever they felt new scientific information justified a different standard of workplace safety for two reasons. First, what is normally negotiated in any contract extends beyond health and safety issues. Second, workers generally have less access to new, relevant health and safety information than their employers. The scientific tests on which new standards are based are in general conducted only by the industry. They are not made public unless regulations specify that they should be.

Similar problems exist with a safety net–contract approach to some environmental issues. Also, in the case of the environment, not all interested parties can be identified or made participant in any bargaining or contract. Almost inevitably, government is asked to step in as one party to a contract, to ensure that the public's long-term and more

general interests are met. But governments invariably have more than one interest to protect, since projects that endanger the environment also provide jobs. More important, perhaps, enforcing a contract requires at least as much political will (and use of government resources) as enforcing governmental regulations. If a safety net–contract approach is proposed as a means of ensuring that regulations are enforceable, its effect may be the opposite.

Alternatives to regulation, using a safety net approach and involving contracts between interested parties, can be used most successfully, then, only when the issues can reasonably be negotiated at the time of the contract. A safety net approach involving bargaining and contracts is a useful alternative to government regulation when the parties to bargaining have approximate parity with respect to reopening of negotiations and access to information. Contracts can be used successfully when all parties to those contracts have the resources to ensure court-backed enforcement of the agreements that are reached. In consumer or occupational health and safety issues, these conditions seldom apply. Other approaches to law and regulation are then necessary.

The Quality of Life Approach

Ironically, a safety net approach does not work well in dealing with consumer problems, since consumer problems are often the result of market distortions and failures. As Belobaba suggests, little public consensus exists about what protection consumers should receive. Even though well-conceived laws are on the books, he argues, implementation and enforcement of consumer law are poor. The interested parties can seldom negotiate effectively on their own behalf. The legal research suggests that the legal and regulatory safety net, erected since 1970, has failed to produce the protections that most consumers view as appropriate.

Another approach to law and regulation might well produce more satisfaction than the safety net approach. It can be called a "quality of life" approach, since it depends on using law and regulation to establish positive social goods that reflect overarching social values. Quality of life values are those not seen to be suitable for interest group negotiation. They are values that are unlikely to be realized even in the most efficient market system. Public broadcasting is one example of a service that is implemented to achieve quality of life goals.

The argument for using a quality of life approach rests partly on Belobaba's research on consumer law. Belobaba argues that what is at issue in consumer law is not the number of injustices occurring in the marketplace, but the quality of life that consumers enjoy, or rather do not enjoy, as a result of their market transactions. The smaller injustices are compounded by the difficulty that consumers also face in redressing more serious complaints through the courts. The result is that consum-

ers begin to distrust the legal system and the institutions it supports. A deep-rooted cynicism takes hold, one that encompasses the courts and law, governmental institutions and even the marketplace. This cynicism, Belobaba suggests, undoubtedly affects the quality of life.

A quality of life approach to law and regulation sees the state as an instrument of the will of its many publics, not as a coercive force. From this perspective, the state reflects legitimate social values and acts, positively as well as reactively, to ensure that those values are reflected in programs, laws, regulations and policies. If a quality of life approach is taken to law and regulation, costs and benefits can be considered. But the decisions to be taken reflect value choices primarily, not a technical assessment of costs and benefits. Sometimes these decisions are made in spite of the costs involved. Questions of who is at fault, normally determined through a judicial process, also can become irrelevant if a quality of life approach is properly applied. Social welfare legislation, family law, some environmental law, and regulation of potentially dangerous drugs are all examples of a quality of life approach.

Some Value Considerations

In a quality of life approach, both legal and regulatory action are seen to be ways of implementing legislatively determined goals. The primary assessment to be conducted is not about the costs and benefits of any specific regulation or about risk. It is about the values that specific laws should reflect, about the goals for legal or state action. What must be evaluated, first, are the broad contours of the value debate within which any specific legislation or regulation will be enacted. The relevant question for the policy debate in a quality of life approach is: "What should be done?" Questions about the design of legal or regulatory bodies or about the impact of specific regulations are important, but only secondarily.

Different theoretical assumptions about the relationships between law and values (and the results of governmental action) are made in the safety net and the quality of life approaches to law and regulation. In particular, social change is understood differently in the two approaches. The point is difficult but important. In developing a regulatory safety net, changes (including governmental initiatives) are considered to be cumulative, and each regulatory action must be evaluated separately to determine its impact. In a quality of life approach, on the other hand, social changes are not viewed as cumulative, and thus government policies must operate within a long-run perspective to be effective.

The best way to make the point is by illustration, in this case from environmental regulation. Let us assume that a hydro-electric company wishes to erect a new hydro pole, to improve the electrical service to a semi-rural community. Erecting a single pole is not, of itself, likely to change the scenic value of the landscape (although a chain of such poles or the overhead wires they support might). Yet a community protest

ensues. The issue discussed is the scenic value of the landscape, and the arguments from the community seem, at first glance, disproportionate to the amount of damage being done.

On what grounds could the community protestors be seen to be justified in their fears? Their answer is simple. They argue that it is impossible to know the consequences of any single action, or the point at which the scenic value of the landscape is changed, either by the hydro pole or by decisions that logically follow from its construction. They would suggest that a parallel could be drawn between environmental and other policy decisions. For example, they would argue that a neighbourhood is not changed by a single zoning decision, but one zoning variance can be reasonably viewed as effecting a change in the character of a neighbourhood, the values of the properties within it or the cityscape as a whole. One additional unit of pollution will seldom result in a significant change in the level of environmental degradation. The decision to engage in uranium mining exploration does not, of itself, make British Columbia or Saskatchewan into provinces with a commitment to the nuclear club. At some point, however, the community protestors argue convincingly, a neighbourhood is changed, a creek is polluted, the view is made uninteresting (at best), and the perception of Canada in the international community has been altered.

A quality of life approach, then, is posited on the assumption that most community changes are not cumulative, and that community changes cannot be measured by the economic formula "marginal cost equals marginal benefit." Any single decision must be treated as if it had significant effects, because there is no way to determine which of many small, and seemingly insignificant decisions, represents a turning point in the maintenance of particular social values. In a quality of life approach, community and collective entitlements, however derived and difficult to envision, are considered legitimate, even if they cannot be represented in the assessment process by any interested group. Government action is at least partly pro-active, and governmental planning should take long-run considerations into account, even at the cost of introducing short-run inefficiencies into specific markets.

Conditions for Success

As with safety net approaches to law and regulation, a quality of life approach works well under some conditions but not others. These conditions can be identified and listed:

Agreement on values A quality of life approach works best when there is broad agreement about the overarching social values to be protected by law and regulation or when the value debate is resolvable in a reasonable period of time. For example, universality and public broadcasting are quality of life issues that can be determined reasonably in the

policy process; abortion is a quality of life issue that is not amenable to resolution in any value debate leading to policy because opinion is too highly polarized to make compromise possible.

A legislatively oriented process A quality of life approach requires a publicly responsive, legislatively oriented process so that the values to be embodied in law and regulation can be determined. For example, the key variable in establishing a quality of life approach in law or regulation is openness, since the value debate must take shape in the public arena, but be reflected in policy. Closed door consultations, even between many different interest groups, are unlikely to produce acceptable quality of life policies.

Long-range planning A quality of life approach requires planning and long-range strategic thinking if broad social goals are to be achieved. Value choices must be made before specific decisions are taken. A widely drafted legislative mandate and a rule-making approach to regulation seem crucial. The FM policy in broadcasting is an example of the rule-making approach; the decision on licensing pay-TV operators is an example of its opposite.

Accountability measures Because quality of life issues cannot be assessed easily or in highly technical terms, courts or agencies require significant discretion in their assessment of particular cases, but their authority must be held in check by measures to assure their accountability. For example, if courts or agencies are to act substantively and knowledgeably, they require their own expert resources. But large agencies with highly expert staff, as Mullan points out, require a variety of checks and balances to ensure their accountability.

A broad-based assessment In a quality of life approach the assessment done for the purposes of policy making must include a wide variety of views. Simply granting status to the most powerful or best represented interests will not suffice. A good value decision is not always a popular decision nor a decision that is popular with the most powerful interest groups. For example, the marketplace is, at best, only one indication of quality of life values to be implemented in policy. A single individual can, and often does, raise significant issues about a decision, regardless of whether he or she is representative of public opinion at large.

A mix of mechanisms for implementation In a quality of life approach, a variety of legal and regulatory instruments (courts, mediation procedures, conciliation techniques, arbitration procedures and consultation) is usually required to ensure that legislative goals are met. There

must be a proper mix of pro-active and regulatory initiatives. For example, in family law, various judicial approaches are combined with administrative measures and attempts at conciliation and mediation to produce an adequate quality of life result.

Applications and Problems of the Quality of Life Approach

A quality of life approach is used when the purpose of law and regulation is to achieve particular social values. The *Broadcasting Act* is a good example of quality of life legislation, but so too are family, social welfare and immigration law to the extent that each posits particular social values to be achieved through a combination of law and regulation. Problems in developing and implementing quality of life approaches arise when there are conflicts in values between groups seeking different kinds of legislation or within the legislative framework itself. Conflicts in jurisdiction also confound the value debate when it becomes unclear which level of government is the appropriate locus for setting and implementing quality of life goals.

It is worth examining one example of how various legal researchers suggest value conflicts should be dealt with. In their research studies on family law, both Payne and Mossman deal with conflicts in values within a legislative framework. Both suggest that the first step in resolving value conflicts is to make these conflicts explicit to facilitate a re-evaluation of the values that law and regulation should reflect. Often, they both argue, this re-evaluation requires the public and policy makers to step beyond a simple evaluation of the law and of the regulations themselves. It may be necessary for the public and government to consider broad social and governmental initiatives to achieve quality of life goals. But Mossman claims that it is possible to develop a coherent body of legislation — rules and regulations and court decisions — in family law that promotes equality in a social and economic sense for both men and women. Payne, on the other hand, suggests that it may be necessary to restrain the expectations about the capacity of law and regulation to solve quality of life problems arising from marital breakup, given the many other competing claims upon the state's resources.

Other kinds of problems with a quality of life approach to law and regulation are dealt with by Monahan and Tremblay in their discussion of the role of the Supreme Court on jurisdictional issues. Both make the point that the Court has followed different principles at different times. At times, the Court has sought to apply what a lay person would call a "legalistic" solution to jurisdictional conflict by seeking to define strict boundaries of jurisdiction between the two levels of government on specific issues. At other times, the Court has acted more pragmatically, recognizing the complex nature of the issues to be determined and the necessity for active cooperation between the two levels of government in policy making. Both Monahan and Tremblay support the more prag-

matic approach as appropriately reflective of the Canadian policy process and of the complexity of the issues often involved. Tremblay notes, however, that the pragmatic approach has been hampered by the fact that the Supreme Court can voice its thoughts only in response to the cases presented to it. And Monahan emphasizes that some issues require not only a pragmatic coordination of jurisdiction, but also significant levels of technical and economic expertise. He suggests that a more administratively oriented body than the Supreme Court is (or should be) might combine the required technical expertise with a pragmatic approach to allocating jurisdictional responsibilities, at least on economic issues where a utilitarian rather than a value choice is required.

Finally, a number of commentators have also pointed to problems in implementating and enforcing quality of life laws and regulations. Emond, for example, argues that little within the incentive structure of regulated corporations would encourage compliance with regulations that are seen to have social goals and significant costs to industry. Regulatory agencies, in particular, are often described as inflexible and ineffective. A number of alternatives to regulation have been proposed by various researchers. Each seeks to match the goals of law and regulation with the kinds of decisions that corporations make. Emond cites a suggestion that companies should be paid for compliance with the law. He takes exception to the ethical stance reflected in any proposal to pay people, or companies, for compliance with the law. Emond suggests instead some measures to increase the cost of non-compliance and/or some incentives for positive initiatives to achieve quality of life goals. Proposals for "pollution charges" fall into this latter category of alternatives to regulations to achieve quality of life values. So too do tax incentives for frontier resource development or for research and development expenditures made in Canada by multinational firms.

As Emond notes, it is too early to assess the value of these new proposals, since few have been fully tested in practice. All the legal researchers would agree that even these seemingly non-regulatory options for achieving quality of life goals require some form of assessment (how much should be charged; what incentives are appropriate; how much neighbourhoods are charged; how much pollution is occurring) and some means of effective implementation and enforcement.

The Redistributive Approach

In Canada, the conventional approach to the role of law and regulation is to see both as achieving an equitable distribution of resources. Conventionally, again, the policy debate has centred on which of various possible redistributive goals should take precedence at any one time. Different programs have been initiated in different periods to deal, for example with a variety of disparities: among regions, between rich and

poor, between rural and urban areas, in social or economic opportunities, in language or culture, etc. Sometimes government action is primarily legislative; sometimes regulation is achieved through agencies and tribunals. Sometimes it takes the form of special grants and programs. And sometimes the general taxation powers of government are used to effect something approaching a more equitable distribution of resources. All of these measures are regulatory, and all have as their goal an allocation and a redistribution of resources.

The current deregulation debate has altered this conventional view of the role of law and regulation as designed to achieve equity in resources. Some commentators have gone so far as to argue that only the market, not the state, should be involved in the distribution or redistribution of resources since only markets, they argue, can guarantee efficient use of resources. Others have emphasized the high cost of many state-run redistribution programs, comparing those costs to the benefits actually achieved. These commentators recommend pulling back from using state intervention to achieve a more equitable distribution of resources unless it can be demonstrated that the benefits from interventionary initiatives far exceed the costs. These two approaches are popular, but they do not yet reflect a general consensus, even among academics and certainly not with the public. Nonetheless, the existence of these critiques has placed new questions on the agenda for debate.

The term most often used in the current policy debate when dealing with the possible redistributive effects of law and regulation is "cross-subsidy." That term has taken on a negative connotation because of the many critiques of government intervention. It is worth examining what is meant by cross-subsidies in more detail. In any economic analysis, the term has a technical meaning that translates into non-technical language as the financing of unprofitable services from the resources garnered from more profitable ones. The economists' critique of cross-subsidies is that they promote inefficiencies in the use of resources and within specific markets. The quality of service suffers, economists argue, because unprofitable and inefficient sectors of industry are propped up by a transfer of resources from more profitable ones. Prices to consumers for goods and services are higher than they would be without cross-subsidies because they combine both efficient and inefficient use of resources. Some economists also argue that cross-subsidies are used by large companies to circumvent regulatory scrutiny. Evidence is easy to find to support these arguments.

Disagreement with these arguments comes from those who step outside the logic of and economic evidence presented by economists to deal with other kinds of data about and issues in social policy. They suggest that the logic of the marketplace cannot be extended to all policy decisions, and that some costs and indeed some inefficiencies are justified to fulfill a national and a social interest. They suggest that other

kinds of data besides economic data should be included in any assessment of policy. Cross-subsidies are exactly what is intended in regional support programs, in equalization payments, in social welfare legislation, in grants to Third World developing countries, and in any program that transfers some benefits from the profitable sectors of the economy to those with fewer social or economic advantages or opportunities. Cross-subsidies are usually necessary to achieve an economic union. Measures that support the continuation of unprofitable rail lines, of airline service to remote or smaller communities, of cable service to outlying districts, and of Canadian content on Canadian broadcasting stations cannot be justified on the basis of a strict economic logic. These measures all structure inefficiencies into the particular markets involved. Nonetheless, they can be seen as necessary and desirable to achieve certain national or social goals that have ben mandated by the legislatures. These national or social goals could not be achieved without some form of cross-subsidy.

The "redistributive" approach, then, is one that involves cross-subsidies, decisions about who will benefit from and who will pay the cost of maintaining the social and economic system in Canada. In a redistributive approach, the state is an instrument of social policy. By virtue of its activities, or lack of them, transfers of resources are made possible and implemented. Different policy approaches shape the redistribution efforts of government differently.

Approaches for Achieving Redistributive Goals

The debate about cross-subsidies and regulation has obscured an understanding about how legal institutions are now and might be designed. Before the value choices inherent in different approaches can be identified, a few remarks are necessary. A common perception is that governments must choose between a laissez-faire and an interventionist approach, and that the institutions they mandate will be either formally adjudicative or administratively oriented.

Although Arthurs deals with more than the redistributive aspects of law and regulation, his analysis will be useful here. Arthurs argues that, in practice, when the constraints of the political process are taken into account, most legal institutions fall on a continuum between a strictly laissez-faire and an interventionist approach. For example, a market or laissez-faire approach can be compromised, in practice, by the active supervision of governments of those markets; an interventionist approach can be considerably less than interventionist if those implementing a regulatory mandate are less than committed to government intervention or if they lack the resources to carry out their mandates. Similarly, he suggests, most legal institutions involve an interplay of formal adjudicative and administrative procedural forms. Thus, the choices are more complex than a simple distinction between laissez-faire

and intervention would suggest. Again, in the actual implementation of law, both administrative and formal adjudicative processes may be combined. Let us examine the currently discussed options in terms of the degree of laissez-faire or governmental intervention each involves.

Equalization payments While not involving "regulations" in any formal sense, equalization payments are highly regulatory in effect. They substitute direct and active involvement of governments for the actions of the marketplace. They are implemented through an administrative procedure, but occasionally must be negotiated through the courts.

Crown corporations As Garant notes, the differences in operations among various Crown corporations are significant and reform is required. Some Crown corporations are less administrative in orientation than the government departments they often replace (for example, Canada Post), but all are highly interventionist, even if they are relatively independent of the will of legislators. Garant recommends that Crown corporations be treated more like private sector companies with respect to the law, but that they also be subject to *a posteriori* supervision to ensure their accountability.

Subsidies Subsidy and tax incentive programs are designed to complement or compensate for market actions, but they are a highly interventionist form of government involvement. Subsidies are implemented administratively and therefore involve the establishment of an administrative structure within government to oversee their distribution.

Regulatory agencies Different agencies use more or less formal adjudicative procedures, despite the fact that agencies are considered to be administrative in nature. Also, although regulation by an agency is generally considered to be an interventionist strategy of government, agencies respond only to applications, usually generated in the private sector. For this reason, they are less interventionist than subsidies, for example.

Public–private sector consultation Consultative approaches, on the other hand, always involve the close working relationship of governmental and various interest groups. As a result, although not usually described in this manner, a consultative process does involve extensive "intervention." But consultation is a highly administrative process.

Self-regulation Finally, self-regulatory approaches are designed to mesh with a "laissez-faire" orientation of government policy, but usually require some formal adjudicative (court-based) process to ensure that disputes between parties are resolved, and that self-regulatory codes are enforced. They involve minimal governmental involvement.

The reason for emphasizing that all initiatives are inherently regulatory is to avoid any sterile debate between pro- and de-regulatory options. It is apparent from Arthurs' discussion that, for example, government regulation (as traditionally conceived) involves less government involvement (especially since many agencies lack the resources or political will to enforce all their regulations fully in every instance) than do subsidies, equalization payments or even consultation.

Using Arthurs' discussion, it is also possible to avoid the equally sterile debate between advocates of a formal adjudicative and an administrative approach. His model suggests that subsidies are as highly administrative in nature as is consultation. In many cases, even self-regulation depends upon the existence of a formal adjudicative procedure, in this case to ensure enforcement of the "codes" adopted by those charged with regulating their own industry.

This lack of clear distinctions between so-called interventionist and laissez-faire approaches or between formal adjudicative vs. administrative procedures should not be cause for alarm. If, in fact, the options all balance intervention/laissez-faire and formal adjudicative/administrative approaches somewhat differently, then policy makers have the freedom to tailor each government initiative to meet the specific need at hand or indeed to combine approaches (regulation plus tax incentives and subsidies, for example) to achieve their policy goals.

Some Value Considerations

To determine the value implications of the various options, it is also necessary to pay attention to the symbolic messages inherent in each. For example, the symbolic messages conveyed with equalization payments are different from those in a regulatory regime, different again from those conveyed with the establishment of a Crown corporation, although each involves a redistribution of resources. Partly, this symbolic content stems from the directness of the state interventionary effort, as described below. Equally, however, each kind of initiative carries a distinct kind of message.

The legitimacy of state action rests partly upon these messages. So too does the willingness of the public and industry to comply with and cooperate in various programs. The obvious example is the reaction to programs like the National Energy Program or the Foreign Investment Review Agency (FIRA). In each case, real and pragmatic opposition from some sectors of the community was combined with opposition to the symbolic message conveyed by the program as a whole. Even when reforms were adopted that changed the orientation and implementation of each program, the opposition remained, in this case mainly because of the symbolic content of the programs rather than any specific provisions within them.

What are the symbolic messages inherent in each of the options

identified above? Let us examine each option. Equalization payments might be regarded, in theory, as a form of subsidy, but the terminology used to describe this form of resource redistribution conveys a sense of partnership among equals. The symbolic message inherent in equalization is one that accords equal rights and capacity to negotiate to all participants. Equalization payments are considered appropriate between provinces but not, interestingly enough, in social welfare, even though redistribution is involved in both cases. Perhaps, indeed, as Bureau, Lippel and Lamarche have suggested, limits are intended upon the redistribution of wealth enforced through social welfare programs and these limits are conveyed to the public in the design of and labels for redistribution programs used in social welfare.

Subsidies, a measure now being advocated as an alternative to social regulation, convey quite a different message, and thus involve a different kind of value choice than equalization payments. Subsidies imply that the giver and receiver of aid are not on an equal footing, are not partners in an economic union. Generally, those who receive subsidies do not expect to participate, other than (at best) by vigorous lobbying, in the design and implementation of the subsidy program from which they will receive aid. It is generally accepted that the giver will design the criteria to be used in awarding subsidies, and that these subsidies may not correspond to what the receiver of subsidies considers appropriate aid. Those who receive subsidies are considered supplicants, and are expected to plead their case and indeed also to be grateful for any aid they receive.

A regulatory regime, on the other hand, establishes duties and obligations upon all the parties to the regulatory negotiation in return for benefits established through regulation. Thus, while regulation can be seen as inherently more coercive than other types of government initiative, regulation imposes both costs and benefits on all participants, and recognizes all participants as parties in the procedures of negotiation. For example, small municipalities may receive electrical services from a regulated public utility at less than the cost of delivering them. The regulated utility, in turn, depends upon the agency to protect its more profitable markets and, in return for the benefits it receives from regulation, is willing to assume some social obligations also imposed through regulation.

Finally, the establishment of a Crown corporation conveys a mix of symbolic messages, a conflicting picture of value choices. Crown corporations can be seen to impose duties and obligations, like regulation. They can be seen as interventionist, even if they are less interventionist than the government departments they replace. The use of Crown corporations to achieve redistributive goals conveys a sense of direct governmental initiative on a specific problem, but any specific Crown corporation may be designed to act as if it were a private corporation responding

mainly to the dictates of the marketplace. Crown corporations are mandated to achieve social and political goals, but are also expected, in some cases, to act as if they received or benefited from no special treatment from government. This mix of expectations contained in the symbolic messages of Crown corporations is bound to create controversy for governments seeking to achieve redistribution goals even if the corporations themselves are both efficient and useful in furthering policy goals.

Conditions for Success of Each Approach

It was argued above that the various approaches balance intervention/laissez-faire and formal adjudication/administration differently. It was also suggested that each option for achieving redistribution conveys a different symbolic message. How, then, are choices to be made among the options, assuming that one wishes to pursue a legal pluralism (different institutions designed to achieve different purposes), and to take account of value choices in developing public policy? The answer lies in determining when, and under what conditions, the various options constitute genuine substitutes for each other. It lies in showing when the choice of any one forecloses certain value choices and supports others. The legal research suggests the following:

1. Subsidies can replace "regulation by regulations" if the political will to deregulate (i.e., to eliminate regulation by regulations) is complemented by the will to establish appropriate levels of subsidies. For example, support for Canadian cultural production is now considered a duty, imposed through regulation, on all regulated industries in the broadcasting sector. Were the broadcasting industry to be deregulated, it would be essential to replace the current "duties" with new subsidies if the same social values were to be maintained.
2. Since critiques of regulation by regulations often focus on problems with implementation and enforcement of regulations, attention must be directed to how subsidies would be implemented and how their public interest goals would be enforced if subsidies were to be regarded as substitutes for regulations. For example, because regulatory agencies have an ongoing relationship with the regulated industries, and because those industries are dependent on regulation or licences to carry out their desired activities, regulators have a mechanism for implementation and enforcement of their regulations (assuming agencies have the political will to use it). Any subsidy or special levy program also requires mechanisms to ensure implementation and enforcement if subsidies are to be seen as a substitute for regulation.
3. Since regulation by regulations involves a trade-off of costs and benefits for all interested parties, any dismantling of regulation by

regulations that reduces the costs of regulation must also reduce the benefits received from regulations (or ensure that these benefits are provided in some other way) if the same values are to be maintained in the change of approach. For example, a full deregulation of an industry (removal of *both* the costs and the benefits of regulation) may be preferable to a partial deregulation if partial deregulation leaves intact the benefits of regulation to those now operating under a regulatory mantle, but eliminates many of its costs.

4. On the other hand, regulation by regulations will seem burdensome if additional duties and obligations (costs) imposed through regulation are not offset by new economic benefits also conferred by regulation. For example, when new technologies provide opportunities for economic development that cannot be realized because of current regulatory arrangements, the duties of regulation will seem newly burdensome.

5. Since regulation by regulations and equalization payments confer equal status on all participants, neither can easily be replaced by subsidies, which do not, unless the intention is to change the relationships between the participants as well. For example, a "subsidy" to the have-not provinces, subsidies to Canadian independent broadcast producers and subsidies to small communities now supported by rail or air service all ensure that the have-not participants are reduced to the status of being supplicants for aid.

6. In theory, Crown corporations can provide a good mechanism for the implementation of government policy, but Crown corporations are caught in a conflict of expectations that undermines their credibility and performance. Currently, Crown corporations too often try to function simultaneously in the public and private sectors; their actions are compromised by *a priori* government supervision, but they exercise unfair advantage in particular markets by virtue of their Crown status. For example, the CBC and Air Canada are both Crown corporations caught in a conflict of public expectations.

7. Consultation and self-regulation can replace regulation by regulations only to the extent that justice will be seen to be done from the more informal and often closed-door consultations or from self-regulatory efforts. This concern for justice must extend from the process by which decisions are made to the implementation and enforcement of decisions. For example, achieving adequate environmental protection measures through a consultative rather than regulatory process will result in a perception that justice remains to be done. With consultation neither enforcement nor compliance is visible. Thus a perception ensues that the broad social interest in environmental protection has been ignored.

Applications of the Various Approaches

While redistribution is not formally the goal of cultural policy (although cultural policies are designed to achieve redistribution of resources to support cultural production and industries), cultural policy is a good example to use to illustrate the implications of choosing different public policy approaches. The CBC is an example of a Crown corporation that functions at the mid-point between the public and private sectors. The CBC must solicit advertising and compete for its share of the audience market. But the CBC is also dependent on subsidies, and views itself as a supplicant for government aid. Its actions are constrained by an administratively oriented regulatory agency that intervenes to determine how the CBC will fulfill its legislative mandate. Thus, the actions of the CBC are demonstrably hampered by public controversy created by the mix of symbolic messages involved in the method of its operation and continuing financing.

Most broadcasting policy is implemented through regulation, and the Canadian Radio-television and Telecommunications Commission (CRTC) is an example of a regulatory approach. The objectives of the *Broadcasting Act* are to promote cultural opportunities and diversity, using the broadcast media. Regulation imposes those objectives as duties and obligations on all industries functioning in the broadcasting sector, including cable operations. In return for regulatory protection of their markets, all broadcasters and cable operators are expected to make a contribution (in effect, a redistribution of their resources) to support Canadian culture and identity. This they do reluctantly, but few members of the industry argue for the full dismantling of the regulatory regime, since both cablecasters and broadcasters benefit significantly from some aspects of the regulation of their industry. It is worth noting that, in broadcasting regulation, not all interested parties have to be represented for their interests to be considered as part of the public interest. The CRTC is expected to act as proxy for the public's interests as well as to function as a locus for interest group negotiation. Nonetheless, the agency has been often criticized as being unaccountable.

Film policy is an example of public policy being implemented through taxation programs and subsidies. Without active and persistent lobbying by cultural and production groups, subsidies for filmmakers would undoubtedly be curtailed. In the face of government restraint programs, subsidies are often the first government expenditures to be cut. Thus, neither subsidy nor taxation measures provide continuing security for their beneficiaries, the cultural community. In addition, a number of problems have been identified with the implementation of subsidy and taxation programs since they were established. Regulatory supervision has been instituted, through Telefilm Canada rather than the CRTC, to ensure that the policy goals of the subsidy programs are met.

Finally, there has been widespread experimentation recently with

forms of self-regulation in the broadcasting and related industries. In one case, both the industry and members of the public have been involved with the development of industry codes, and the resultant codes are designed to be self-enforcing. In another, the industry has been asked to develop its own codes, but the regulatory agency will be responsible for enforcing these codes, when they are adopted, as regulations. Finally, a number of other industry codes exist that act as guidelines for the members of the industry. These last codes have been developed only by the industry itself, and are not self-enforcing. To what extent can these experiments in self-regulation be seen as successful? The answer is more difficult than it first appears to be. The threat of regulation from the CRTC is a powerful motivating force in the development and implementation of self-regulating codes. Were the threat of traditional regulation removed, members of the industry admit frankly, self-regulation would probably be much less successful than it appears to be now.

Each of the approaches to cultural policy cited in the discussion above — subsidies, tax incentives, regulation, Crown corporations and self-regulation — carries with it certain advantages and disadvantages. Only when governments intend to change the symbolic messages or the redistribution effected by their initiatives are changes from one approach to another desirable. All approaches work now, more or less equally, to achieve the goals of public policy, but each approach carries with it a different picture of the government's goals. Each approach engenders different relationships among those involved in or benefiting from cultural policy. Each approach allocates the costs and the benefits of cultural policy somewhat differently. The discussion of alternatives to regulations is really a discussion of different ways of regulating, or (if the term regulation is confusing) of achieving the purposes of public policy as determined by legislators.

Concluding Remarks

The choice of policy options is wider than one would believe from listening to the current policy debate. But policies are never made in a vacuum. Policy makers ignore current preoccupations and concerns of the public and of their colleagues at their peril. These preoccupations colour the discussion of value choices, and lend credence to the discussion of some policy options and not others.

For example, no reforms could be fully debated and successfully implemented today without recognition of provincial demands for an increasingly large share of decision-making responsibility. The provincial governments have established themselves as the representatives of regional and local interests in negotiations with the federal government. The legal research demonstrates convincingly that the interests of the provincial governments have not been underrepresented in the federal

court system and in the decisions of the Supreme Court. Nonetheless, a demand exists to make a number of Canadian institutions, including the Supreme Court, more explicitly representative of the needs of the provinces. If the provincial governments believe that Canadian institutions are unfairly biased toward the federal powers, and they believe they lack effective decision-making power, unfairness is a reality which must be taken into account in current reforms.

Once a demand for more powers has been made by provincial authorities, existing jurisdictional arrangements no longer serve as an adequate guide to the division of powers, regardless of the consequences of any specific reform. Areas traditionally conceived of as subject to federal jurisdiction are scrutinized at federal-provincial meetings, and new challenges are launched through the courts. The result is often significant change. Take the example of jurisdiction over broadcasting. Five years ago, the consensus was that the issue had been resolved in favour of federal jurisdiction. But for more than ten years, jurisdiction over broadcasting has been a subject on the agenda of federal-provincial meetings. Today, the long-standing arrangements are being reconsidered, in the courts primarily. But even a conclusive Supreme Court decision is unlikely to end the negotiations over jurisdiction over broadcasting. As Monahan notes, even a Supreme Court decision that confirms existing jurisdictional arrangements often results only in a shift in the locus of negotiations over jurisdictions, from the courts back onto the agenda of federal-provincial meetings.

Once any group consistently and powerfully demands active participation in the decision-making process, questions are raised about existing procedures for decision making and existing jurisdictional arrangements. The presence of highly vocal actors, the breadth of their claims and the apparent contestability of all existing divisions of power and procedures for decision making all ensure that their claims will be regarded as legitimate, and that the claims will be negotiated through the courts, through federal-provincial meetings or through the political process.

For example, environmental groups have raised questions about jurisdiction over the pesticide registration process, and forced changes in the registration process to accommodate their demand for participation. Industry groups have lobbied for a more "consultative" process; the result is a new pesticide information program costing more than a million dollars that has been put into effect despite the current emphasis on restraint. Lobby groups in every sector of the economy have forced a government accustomed to relying on expertise from within the government itself to publish a regulatory agenda and to solicit submissions from various non-government groups. Cost-benefit methodologies, which have been criticized extensively in the academic literature, are used extensively by every government department in making decisions, partly at the demand of groups seeking reform. The claims made by

various groups have made it impossible for policy makers to avoid what were formerly regarded as closed questions.

This pressure for change takes the form of demands for what is conveniently labelled "consultation." The call for greater consultation comes from groups with widely divergent aims. The result of their demands, however, has been the institution of public consultation programs in almost all departments of the federal government and extensively in most provincial governments as well. Some caution is necessary in interpreting the demand for consultation, however. The groups seeking more consultation (and indeed also greater "representativeness" and "accountability" in government generally) act as if they were a coalition. An impression is too easily formed that procedural and jurisdictional changes will be welcomed widely, regardless of their actual effects, simply because many of the groups advocating change use the same language in advocating reform. The Economic Council, the Law Reform Commission and other similar policy advisory bodies are necessarily influenced by the apparent coalition of groups all seeking reform. Their reports echo and reinforce current policy preoccupations by giving accountability, representativeness and consultation specific meaning in the development of a series of recommendations. The apparent coalition of groups seeking reform is an unstable one, however. The current preoccupation of the "members" of this coalition is with questions of process, with questions about how decisions are made. If decisions result from the new jurisdictional arrangements or procedures (from the newly "accountable" or "consultative" bodies) that fail to satisfy many of the advocate groups — as inevitably they will — other kinds of proposals for reform will be made. What seems like agreement about the value priorities for law and regulation will dissolve into conflicts when the focus of attention shifts from how decisions are made to the decisions themselves.

The rhetoric of the current policy debate obscures important differences and substantive disagreements over policy issues. It results in a number of key subtantive issues not being addressed. A consultative process means something different to an environmental activist and an industry lobby group. For the former, consultation means access to information as a means to extend the scientific assessment of specific environmental pollutants. For the latter, consultation means making regulations more flexible and responsive to conditions in the marketplace. A government that introduces a new consultative process in environmental decision making ignores these differences only at the risk of postponing, and perhaps heightening, a debate about the value choices to be made in any environmental process.

A newly "representative" or "accountable" system of legal and political institutions seems like an attractive option in today's political climate. And indeed, some of the reforms being advocated could only

benefit the public and the government alike. Again, here the rhetoric of the current policy debate obscures some substantive disagreements about policy making among various groups. To suggest only that government institutions should be more representative or accountable is to beg the questions accountable to whom, and representative of which groups? If these questions are ignored, the reforms may prove only symbolic, since a compromise of interests and views will not have occurred.

Finally, it is common today to refer to the value choices that underlie political and regulatory decisions. The analysis in this paper is posited on the assumption that making value choices explicit can aid in the development of policy recommendations. There are situations where reference to value choices does not aid policy makers or their public. Everyone knows what values are, of course, but on closer examination, the meaning of "value choices" and what is implied by value-laden terms is very different. Here especially, the value debate is obscured by rhetoric. For example, the phrase "freedom of choice" is used by followers of Milton Friedman, by cable companies advertising their services (and lobbying for particular communication policies) and by women's groups proposing abortion law reform. Obviously, these groups do not agree on what value choices should be made or on the basic elements of a policy that would encourage maximum freedom of choice. If, as the saying goes, politics is the art of compromise, the use of terms like freedom of choice often acts as a signal that the debate about policy options is closed. It indicates that the positions of various advocates have become polarized, and that compromise, in the form of a generally acceptable law or policy, has become unacceptable to at least some of them.

Appendix
Royal Commission Studies Reviewed for This Paper

Law and Constitutional Issues

Law, Society and the Economy (Vols. 46–51), *Ivan Bernier and Andrée Lajoie, Research Coordinators*

Vol. 46 Law, Society and the Economy

1. Law, Society and the Economy: An Overview, *I. Bernier and A. Lajoie*
2. Law as an Instrument of State Intervention: A Framework for Enquiry, *H.W. Arthurs*
3. Canadian Law from a Sociological Perspective, *G. Rocher*
4. Law and Values, *L. Salter*

Vol. 47 The Supreme Court of Canada as an Instrument of Political Change

1. Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985, *A. Lajoie et al.*
2. The Supreme Court and the Economy, *P.J. Monahan*
3. The Supreme Court of Canada: Final Arbiter of Political Conflicts, *G. Tremblay*

Vol. 48 Regulations, Crown Corporations and Administrative Tribunals

1. Crown Corporations as Instruments of Economic Intervention: Legal Aspects, *P. Garant*
2. Understanding Regulation by Regulations, *R.A. Macdonald*
3. Administrative Tribunals: Their Evolution in Canada from 1945 to 1984, *D.J. Mullan*

Vol. 49 Family Law and Social Welfare Legislation in Canada

1. Family Law in Canada and the Financial Consequences of Marriage Breakdown and Divorce, *J. Payne*
2. Family Law and Social Welfare in Canada, *M.J. Mossman*
3. Evolution and Trends of Social Welfare Legislation in Canada: 1940 to 1988, *R.D. Bureau et al.*

Vol. 50 Consumer Protection, Environmental Law and Corporate Power

1. The Development of Consumer Protection Regulation: 1945 to 1984, *E.P. Belobaba*
2. Environmental Law and Policy: A Retrospective Examination of the Canadian Experience, *D.P. Emond*
3. Corporate Power and Public Policy, *S.M. Beck*

Vol. 51 Labour Law and Urban Law in Canada

1. The Role of Law in Labour Relations, *J.M. Weiler*
2. The Use of Legislation to Control Labour Relations: The Quebec Experience, *F. Morin*
3. Urban Law and Policy Development in Canada: The Myth and the Reality, *S.M. Makuch*

Notes

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1. Any paper, including a synthesis of the work of others, reflects the arguments and values of its author. A synthesis is not easy to write for this reason. Too often, the relationship becomes strained when the author of the synthetic piece attempts to combine her analysis with those of the various researchers being discussed. When the various researchers disagree among themselves, the task becomes even more difficult.

   To resolve this problem and remain faithful to my own approach, I made certain decisions

with respect to this paper. First, I decided to focus primarily on the development of policy recommendations, even if a more comprehensive view of state-corporate relations or of the policy process was sacrificed as a result. Second, I drew from the legal research papers only those aspects of the analysis that were amenable to a discussion of policy recommendations. The reader is urged to return to the original work for a much more comprehensive view of what was argued. And finally, the decision was made to let the legal researchers determine the basic value stance of this paper. Thus, I write from a pluralistic perspective, leaving aside more critically oriented aspects of my own work. And no option for policy makers — whether it involves more government regulation or self-regulation — has been dismissed out of hand.

2. The author attended the founding meeting of the Law and Ethics Committee of ACGIH. The committee has had several meetings since then. The use of the Law and Ethics Committee is intended as a heuristic device, and should not be taken as an indication of any of its members' current views, which may have changed in the interim.
3. Some who would subscribe to the views described here as public choice theory would still reject the label "public choice theorists." The label is a convenience, and can be used with an appropriate disclaimer: public choice theory refers only to one particular constellation of views expressed in the academic literature about political and economic issues, not to an analysis offered by any particular writer or to a disciplinary (and market-based) analysis of the economy.
4. There is another quite different approach to identifying the "roles" of the state, one that places emphasis on the relationship between the state and the corporate sector, and locates the state's various "roles" in terms of how the state contributes to the reproduction of the social relations of capitalism. That approach is not discussed here, although it is addressed in several research papers, because the emphasis in this paper is on the development of policy recommendations.
5. This view should not be equated with the public choice theory described above, although it is usually seen as compatible with public choice analysis as well as other market-oriented approaches.
6. Whatever the criticisms of a cost-benefit approach to policy making (or a risk assessment approach to public policy), this approach is required by law or regulation in many cases when new policies, decisions or regulations are being made. In other words, the "risk" or cost-benefit approach is very common.
7. See, for example, Andrew R. Thompson, "Bargaining with the Environment: The Limits of Regulation" (Vancouver, 1983), mimeographed; and Barry J. Barton, Robert T. Franson and Andrew R. Thompson, *A Contract Model for Pollution Control* (Vancouver: University of British Columbia, Westwater Institute, 1984).

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THE COLLECTED RESEARCH STUDIES

Royal Commission on the Economic Union and Development Prospects for Canada

ECONOMICS

Income Distribution and Economic Security in Canada (Vol.1), *François Vaillancourt, Research Coordinator*

Vol. 1 Income Distribution and Economic Security in Canada, *F. Vaillancourt* (C)*

Industrial Structure (Vols. 2-8), *Donald G. McFetridge, Research Coordinator*

Vol. 2 Canadian Industry in Transition, *D.G. McFetridge* (C)
Vol. 3 Technological Change in Canadian Industry, *D.G. McFetridge* (C)
Vol. 4 Canadian Industrial Policy in Action, *D.G. McFetridge* (C)
Vol. 5 Economics of Industrial Policy and Strategy, *D.G. McFetridge* (C)
Vol. 6 The Role of Scale in Canada–US Productivity Differences, *J.R. Baldwin and P.K. Gorecki* (M)
Vol. 7 Competition Policy and Vertical Exchange, *F. Mathewson and R. Winter* (M)
Vol. 8 The Political Economy of Economic Adjustment, *M. Trebilcock* (M)

International Trade (Vols. 9-14), *John Whalley, Research Coordinator*

Vol. 9 Canadian Trade Policies and the World Economy, *J. Whalley with C. Hamilton and R. Hill* (M)
Vol. 10 Canada and the Multilateral Trading System, *J. Whalley* (M)
Vol. 11 Canada–United States Free Trade, *J. Whalley* (C)
Vol. 12 Domestic Policies and the International Economic Environment, *J. Whalley* (C)
Vol. 13 Trade, Industrial Policy and International Competition, *R. Harris* (M)
Vol. 14 Canada's Resource Industries and Water Export Policy, *J. Whalley* (C)

Labour Markets and Labour Relations (Vols. 15-18), *Craig Riddell, Research Coordinator*

Vol. 15 Labour-Management Cooperation in Canada, *C. Riddell* (C)
Vol. 16 Canadian Labour Relations, *C. Riddell* (C)
Vol. 17 Work and Pay: The Canadian Labour Market, *C. Riddell* (C)
Vol. 18 Adapting to Change: Labour Market Adjustment in Canada, *C. Riddell* (C)

Macroeconomics (Vols. 19-25), *John Sargent, Research Coordinator*

Vol. 19 Macroeconomic Performance and Policy Issues: Overviews, *J. Sargent* (M)
Vol. 20 Post-War Macroeconomic Developments, *J. Sargent* (C)
Vol. 21 Fiscal and Monetary Policy, *J. Sargent* (C)
Vol. 22 Economic Growth: Prospects and Determinants, *J. Sargent* (C)
Vol. 23 Long-Term Economic Prospects for Canada: A Symposium, *J. Sargent* (C)
Vol. 24 Foreign Macroeconomic Experience: A Symposium, *J. Sargent* (C)
Vol. 25 Dealing with Inflation and Unemployment in Canada, *C. Riddell* (M)

Economic Ideas and Social Issues (Vols. 26 and 27), *David Laidler, Research Coordinator*

Vol. 26 Approaches to Economic Well-Being, *D. Laidler* (C)
Vol. 27 Responses to Economic Change, *D. Laidler* (C)

* (C) denotes a Collection of studies by various authors coordinated by the person named. (M) denotes a Monograph.

Politics and Institutions of Government

Canada and the International Political Economy (Vols. 28-30), *Denis Stairs and Gilbert R. Winham, Research Coordinators*

Vol. 28 Canada and the International Political/Economic Environment, *D. Stairs and G.R. Winham* (C)
Vol. 29 The Politics of Canada's Economic Relationship with the United States, *D. Stairs and G.R. Winham* (C)
Vol. 30 Selected Problems in Formulating Foreign Economic Policy, *D. Stairs and G.R. Winham* (C)

State and Society in the Modern Era (Vols. 31 and 32), *Keith Banting, Research Coordinator*

Vol. 31 State and Society: Canada in Comparative Perspective, *K. Banting* (C)
Vol. 32 The State and Economic Interests, *K. Banting* (C)

Constitutionalism, Citizenship and Society (Vols. 33-35), *Alan Cairns and Cynthia Williams, Research Coordinators*

Vol. 33 Constitutionalism, Citizenship and Society in Canada, *A. Cairns and C. Williams* (C)
Vol. 34 The Politics of Gender, Ethnicity and Language in Canada, *A. Cairns and C. Williams* (C)
Vol. 35 Public Opinion and Public Policy in Canada, *R. Johnston* (M)

Representative Institutions (Vols. 36-39), *Peter Aucoin, Research Coordinator*

Vol. 36 Party Government and Regional Representation in Canada, *P. Aucoin* (C)
Vol. 37 Regional Responsiveness and the National Administrative State, *P. Aucoin* (C)
Vol. 38 Institutional Reforms for Representative Government, *P. Aucoin* (C)
Vol. 39 Intrastate Federalism in Canada, *D.V. Smiley and R.L. Watts* (M)

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